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EDITED FOR THE SOCIETY BY

SIR JOHN MACDONELL, C.B., LL.D.,

AND

EDWARD MANSON, Esq.

"Δεῖ καὶ τὰς ἄλλας ἐπισκέψασθαι πολιτείας . . . ἵνα τό τ'ὀρθῶς ἔχον ὀφθῇ καὶ τὸ χρήσιμον."—Arist. *Pol.* II. 1.

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PRESIDENT TAFT.

[*A Sketch by* R. NEWTON CRANE, ESQ.]

OF the twenty-six eminent men who served the office of President of the United States prior to President Taft, eighteen had been practising lawyers at some time during their career before attaining that high office. None of them, however, had been so thoroughly identified with the law, or had attained such distinction in its practice or in its administration, as the present incumbent of the White House. William Howard Taft was born in Cincinnati in 1857, and was graduated from Yale in 1878, taking second honours in a class of 121. In 1880 he was admitted to the Ohio Bar, through the Cincinnati Law School, in which he divided the First Prize of his year. For a few months he was a law reporter, and then became the assistant prosecuting attorney of his county. In his thirtieth year he was elected judge of the Superior Court of Cincinnati, but, after serving in that capacity for only three years, resigned his office to accept the appointment of Solicitor-General of the United States. His services as a law officer in Washington soon marked him for further advancement, and in 1892 he was appointed, by President Harrison, United States Circuit Judge of the Sixth Judicial District, which embraces the important area comprising the States of Kentucky, Michigan, Ohio, and Tennessee. Judge Taft was an ideal judge. He enjoyed his judicial life, and would have been content to remain on the bench; but President McKinley needed a strong man, one conversant with organic law and constitutional government, and possessed of superior executive ability to reorganise the administration of the Philippines. He urged Judge Taft to undertake the task, and, upon his consenting, made him the President of the Philippine Commission. Subsequently he was appointed by President Roosevelt the first civil Governor of the Philippine Islands. For three years he laboured incessantly over the difficult task of moulding the old materials into a shape which would make them, to an extent at least, receptive of modern governmental conditions. He then spent some months in Rome in difficult diplomatic negotiations with Leo XIII. over the transfer to the local government of the Islands of the agricultural lands and other property of the religious orders in the Philippines. Returning to the United States he declined an appointment to the bench of the Supreme Court of the United States, but accepted the portfolio of War in President Roosevelt's

Cabinet. In 1906 he was sent to Cuba to adjust matters arising out of the insurrection; and, after his mission was successfully completed, he remained to act for a short time as the Provisional Governor of Cuba. Afterwards he visited Panama and Porto Rico, by direction of the President, to inquire into conditions, and to adjust various matters which required executive action. Finally, during the year prior to his nomination to the Presidency, he visited the Philippine Islands again, and also Japan and Russia as a special and ultra-extraordinary ambassador, clothed with authority from the President of the United States to make inquiries and to deal with delicate questions which required settlement. In November 1908 he was elected President by a much larger majority over William Jennings Bryant (321 electoral votes against 162) than his most sanguine friends had anticipated.

Mr. Taft's faults as a President are his virtues. He is too great a scholar, too eminent a jurist, and too just and broad-minded an administrator to be a successful politician. The work which will distinguish his administration appeals to thoughtful men, and not to party managers. Only a small proportion of those who "boss" primaries and arrange and manipulate nominating conventions will be able to appreciate the far-seeing statesmanship which underlies the President's proposal to control and regulate private corporations by the Federal Government, to extend the Interstate Commerce Act, to establish courts dealing directly with such commerce, to secure reciprocity between the United States and Canada, and, most important of all, to provide a general international arbitration treaty. While Mr. Taft has been devising these measures and concentrating upon them his great powers as a lawyer and a forceful and persuasive advocate, politicians have given him only doubtful and half-hearted support. As a result, his party is now in a minority in the House of Representatives and has an uncertain majority in the Senate. Fortunately there is a growing indication that the people who, in the last result, are masters of the politicians, will force the Opposition to yield, and that the measures which he has so much at heart will become law. If this result ensues it is not improbable that Mr. Taft will succeed himself at the presidential election in November 1912.

NATIONAL HEALTH INSURANCE IN ENGLAND AND GERMANY.[1]

[*Contributed by* E. J. Schuster, Esq., LL.D.]

A. INTRODUCTION.

The National Insurance Bill has—as it well deserved—received the sympathetic attention of all classes of the population, but I do not think that it has been fully realised how much it behoves every thinking member of the community to consider its provisions and to form an opinion as to their meaning and as to their probable results. This measure will affect every household in the United Kingdom, its influence for good or evil will be felt in every workshop and every factory, in every commercial and industrial establishment situated in these islands; it will entirely remodel one of the great professions, and no trade and no calling will remain untouched by it. On its influence many important issues will depend. It may, by improving the health and the courage of the workers, further the welfare of industry and trade, or it may, by imposing too hard burdens on some of the trades, cause depression and unemployment. It may strengthen the spirit of energy, of self-control, and of self-reliance which has made this nation a powerful and a great nation, or it may, by lending support to the notion that the State is our refuge in all our troubles and adversities, help to weaken and destroy that spirit. It may further friendly and mutually trustful co-operation between the various classes of the population, or it may intensify class strife and class hatred. Such a measure, however carefully prepared, however competently framed, should not be taken on trust, nor ought we to leave to our representatives in Parliament the sole responsibility of examining its contents. It will, no doubt, be said that the principle carried out in this Bill—in so far as it deals with sickness and disablement, which are the only subjects with which this address is concerned—is simple and easy to understand, and that the consideration of the details must be left to experts; but it will not be difficult to show that the principle is by no means as simple as it looks at first sight, and that in a matter of this kind it is impossible to distinguish between principles and details. Some of the details, of course, cannot be understood without technical knowledge, but the greater part of them can be understood by every intelligent person who is not disinclined to take the amount of trouble which a matter of such paramount importance demands; whoever is unwilling to undergo this amount of trouble is shirking his citizen's duty.

[1] An address delivered at 39, Harrington Gardens, S.W., on May 26, 1911.

To those who have done me the honour to come here to-day, I need not say more on this subject. I am preaching to the converted.

The observations on the Bill which I intend to lay before you, as you will soon see, are of a somewhat severely critical nature, but I should not like to be misunderstood. I do not wish to find fault with the Chancellor of the Exchequer. He was bound to bring in a measure having the general characteristics of this Bill, and he has tried to solve the difficult problem with an amount of skill, ingenuity, and perseverance which calls for the highest admiration. Moreover, it is almost a necessity that the first attempt to grapple with a subject so full of pitfalls should in many parts be unsuccessful.

The country has every reason to be grateful to Mr. Lloyd George for having put this Bill before it, because it is only by means of the detailed consideration of such a Bill that the subject can be properly understood; but before the Bill is understood in all its details it cannot be said to have the approval of the people, and as a true democrat Mr. Lloyd George ought not to force the Bill through without making sure of such approval. The various societies and classes of the population whom it affects, the various persons who have given time and thought to the subject of sickness insurance and of the prevention of disease, ought to have an opportunity to express their views in a more complete and systematic manner than by the recommendation of amendments on particular points. This cannot be done if the Bill is to be passed during the present session. In Germany, which is always described as an autocratic and bureaucratic country, the text of bills of such magnitude is generally published a long time—sometimes several years—before the discussion in Parliament begins, so as to give the Government an opportunity to introduce such modifications as may seem appropriate after full consideration of the results of the public discussion. The Bill consolidating the Insurance Laws which is now before the Reichstag was published over two years ago, though it does not introduce any substantial innovations. Horace's maxim, "Nonum prematur in annum," applies to the legislator's work no less than to poetic productions.

It is not difficult to show that there are many points which require further consideration, and many imperfections which are incapable of being remedied by amendments on particular points brought forward in a hasty manner and without reference to their effect on the general scheme; on the present occasion I shall confine myself to matters the investigation of which is necessary in order to answer the following questions, which—as I hope you will agree—are questions of vital importance: (1) Does the Bill unduly interfere with existing institutions and arrangements? (2) Will its provisions operate justly and equitably as between the various classes of persons whom it affects? (3) Will it operate justly and equitably as between the persons insured and the general taxpayers? (4) Are the burdens which it imposes on imperial and local finance of a limited and calculable character?

(5) Does it rouse expectations which are likely to be disappointed? Before attempting to answer these questions I shall have to give a short summary of the contents of the Bill. I do so in order to prevent all possibility of being misunderstood, and if what I say is already well known to the large majority of those here present, I hope I shall be excused.

B. SUMMARY OF PROVISIONS RELATING TO INSURANCE AGAINST SICKNESS AND DISABLEMENT.[1]

I. Machinery by which the Scheme is to be Worked.

1. **Insurance Authorities.**—A central authority under the designation of the Insurance Commissioners directs the whole working of the scheme. The Commissioners appoint officers and inspectors, issue tables of contributions, and sanction schemes relating to the application of the funds existing at the time when the new law comes into operation, or for the application of surpluses and the covering of deficits; they can make new classes subject to compulsion and grant certificates of exemption to individuals; they regulate the mode in which the contributions are to be paid and recorded; they have to sanction the rules as to fines and suspension of benefits, and the arrangements with medical officers; they have a general control over the approved societies and determine what security is to be given by them. They determine the numbers of the members of each local health committee, and if any difficulty arises with regard to the constitution of any such committee they have to intervene; they issue the general regulations for the working of the law (regulations which, having regard to the somewhat indefinite character of the provisions contained in the Bill, will have to cover a very wide field), and they have to determine numerous questions which the Bill leaves open, and—last, but not least—the whole of the insurance funds will be under their management and control (see ss. 1 (2), 2, 5, 6, 7, 13 (2) (3), 14 (1) (2) (4), 15 (1) (2), 18, 19, 20, 21, 22, 23, 25, 26, 28, 29, 31 (1), (*d*) (*e*), 32 (2), 34 (1), 36, 40, 41, 43 (1), 46, 48, 49, 50, 55, 57). Their powers are so wide that they even enable them in certain respects to modify the provisions of the law (s. 57).

The first duty of the Commissioners will be the appointment of an advisory committee consisting of representatives of associations of employers and approved societies and of other persons whom the Commissioners can select at their discretion. The advisory committee is to be consulted as to the regulations to be issued by the Commissioners and any alterations to be made in the same (s. 42).

The administration of the benefits of the insurance is partly entrusted to the "approved societies" and partly to the "local health committees." The

[1] This summary deals with the provisions relating to England; in respect of certain minor matters the rules applicable in Scotland and Ireland respectively are different from the rules applicable in England (see ss. 58, 59).

approved societies are societies having at least 10,000 members, which are to give security and comply with certain prescribed conditions in a manner approved in each case by the Commissioners. Such a society may impose any condition that may be thought proper on the admission of members, except that no application is to be refused on the ground of the applicant's age (ss. 18, 20, 21, 24). Special rules apply to societies formed for the administration of a superannuation fund created by an employer or a combination of employers; in the case of such a society the ordinary requirements are dispensed with subject to certain prescribed conditions (s. 19).

The persons coming under the insurance scheme who cannot obtain admission to an approved society or are unwilling to join such a society have to enter the insurance scheme as "deposit contributors"; they come under the jurisdiction of the local health committee of the county borough or county in which they reside. Such a local health committee is to consist of not less than nine and not more than eighteen persons, being partly representatives of the county or county borough for which they are appointed, partly representatives of the approved societies having members resident in such county, and partly representatives of the deposit contributors residing in such county or county borough.

A member of an approved society on becoming entitled to any benefit under the insurance scheme has to apply to that society—whilst a deposit contributor has to apply to the local health committee. The so-called sanatorium benefit is, however, in all cases administered by the local health committee (ss. 13 (1), 15). It is not permissible to be a member of more than one approved society or to be at the same time a deposit contributor and a member of an approved society for the purpose of obtaining the benefits provided by the national scheme (s. 27).

2. **Financial Machinery.**—It is frequently said that the new insurance scheme is only a State insurance scheme in so far as it deals with persons who are not members of an approved society, but this statement is misleading, inasmuch as the whole of the insurance funds, whether they consist of the contributions of members of approved societies or of those of deposit contributors, are under the control and management of the Insurance Commissioners. In so far as a contribution is paid on behalf of a member of an approved society, it will, when the scheme is in full working order, be credited to that society. The scheme will be in full working order when the deficit caused by the transitory provisions has been covered. That deficit arises owing to the fact that during the first twelve months persons subject to compulsion will be admitted on the terms on which in future only persons who have not exceeded the age of sixteen can be admitted, and that the reserves held by the existing societies to cover the current risks will be released and applied to other purposes; during the intermediate stage, a fraction of a contribution received from members of approved

societies (two-ninths in the case of each male, one-quarter in the case of each female), will be applied in reduction of the deficit, and only the balance will be credited to the society to which the contributing member belongs (ss. 39, 40).

The contributions of the deposit contributors are credited to a general fund called the Post Office Fund, each deposit contributor having a separate account in that fund [1] to which his contributions are credited. As a deposit contributor is not entitled to any money payments if they cannot be provided out of his own deposit, no original deficit has to be covered in his case (see s. 32).

In the first instance no interest will apparently be credited in respect of the sums paid into the National Insurance Fund; the interest received on the investments is to be accumulated until it is possible to provide interest at the rate of 3 per cent. on the amounts then standing to the credit of all approved societies. Further legislation is promised which will then provide for more extended benefits (s. 8 (8)).

There is an impression in some quarters that the State adds twopence to each contribution, but this is founded on misapprehension; the State does not make any addition to the contributions, but undertakes to pay a fixed proportion of the cost of the benefits and of the management expenses (two-ninths in the case of males and a quarter in the case of females) (s. 3, and see s. 29) (2) (*a*), 39 (2). In addition to this a penny in respect of each person resident in a county or county borough is paid by the State to the local health committee acting for that county or borough as a help towards meeting the expense of providing the sanatorium benefit.

As the administration of the sanatorium benefit is entirely in the hands of the local health committees, the funds required for that purpose are paid to them direct by the Commissioners out of the insurance funds; in addition to the State subsidy of one penny for each insured person which I have mentioned, the sum of 1*s.* 3*d.* for each insured person is to be applied out of the insurance funds (s. 15 (2)).

In so far as the sum available for the payment of the sanatorium benefit under these rules is provided out of State funds, it may be retained by the Commissioners for purposes of research.

The assets and liabilities of each approved society (including of course as part of the assets the amounts standing to the credit of such society in the accounts of the Insurance Commissioners) have to be valued at regular intervals, and if there is a surplus and such surplus is not required for adjustment between the central body and any branch, it is to be appropriated to benefits beyond the normal benefits which will be described in the further course of this address. If a deficit is shown, such deficit must be covered by a levy or by a reduction of benefits (ss. 28-31).

[1] It is also possible to have a collection account for all the depositors residing in a particular county or county borough.

The assets and liabilities of the Post Office Fund (which, as mentioned above, is formed by the contributions of the deposit contributors and which provides for the benefits to which such deposit contributors are entitled) are also valued periodically. If any surplus is shown it is divided among the individual contributors in proportion to the number of contributions received on their behalf respectively.

(If separate accounts are kept for the deposit contributors in any county or county borough, the assets and liabilities appearing in these accounts have to be valued separately (s. 32).)

No provision is made as regards the covering of an estimated deficit in the Post Office by reason of the fact that no deposit contributor is entitled to money payments if his deposit is exhausted and that any deficiency arising through the administration of the medical relief can be covered out of moneys supplied as to one-half by the local authority. In other words, the taxpayers and ratepayers have between them to make up the deficiency as it arises (s. 14 (4) (5)).

The administration of the 1½ millions which are to be applied to the construction of sanatoria is not entrusted to the health committees. It is distributed by the Local Government Board subject to the sanction of the Treasury (s. 47).

II. Compulsory Insurance.

1. **Area of Compulsion.**—Compulsory insurance (leaving aside certain excepted classes) affects in the first place all persons employed under a contract of service in manual labour (whatever their remuneration may be), and in the second place all persons employed under a contract of service in any other form of work provided that they are in receipt of an annual remuneration not in excess of £160 (see First Schedule, Part II. (*f*)). Thus a workman is under compulsion even if his wages exceed £3 a week, and a clerk whose salary does not exceed £160 is under compulsion even if he has large private means.[1] There are special provisions relating to persons in the service of the Crown and to teachers in elementary schools (First schedule, Part II. (*a*) (*b*) (*c*) and see ss. 36, 37).

2. **Contributions.**—Every person, male or female, included in the classes subject to compulsion must either belong to one of the approved societies or become a deposit contributor. The weekly contribution payable in respect of every male insured person is 7*d.*, and the weekly contribution payable in respect of every female person is 6*d.*; 3*d.* is as a rule paid by the employer and the employee pays the rest, but when the weekly wages do not exceed 15*s.* the employer's share is increased.

3. **Normal Benefits.**—As will be shown presently, the normal benefits are subject to considerable modifications arising under the influence of various

[1] The Insurance Commissioners have power with the approval of the Treasury to make regulations for the inclusion of other classes of persons (s. 1 (2)).

circumstances. It will therefore be understood that they are only available in so far as no modifying circumstance intervenes; the normal benefits are:

(*a*) *Medical benefit*; meaning medical treatment, including the provision of proper and sufficient medicines. Whether treatment includes dental treatment, and whether medicines include surgical appliances and other objects required to remedy physical defects, such as spectacles, artificial teeth, hernia belts, elastic stockings, and crutches, is left to conjecture.

(*b*) *Sanatorium benefit*; meaning treatment in a sanatorium or a similar institution.

(*c*) *Sickness benefit and disablement benefit*; meaning payments in case of disablement by reason of illness; the payment in the case of males is 10*s.* per week during the first thirteen weeks, and 5*s.* per week during the remaining period of disablement; in the case of females the weekly payments are 7*s.* 6*d.* and 5*s.* respectively (during the first twenty-six weeks the benefit is called sickness benefit; afterwards it is described as "disablement benefit").

(*d*) *Maternity benefit*; by this is meant the application of the sum of 30*s.* for the benefit of a male insured person on the confinement of his wife, if she be not herself an insured person, or for the benefit of a female insured person on her own confinement. It is not clear whether this payment is made in the case of a premature confinement or in the case of the birth of a stillborn child or not (s. 8 (1) (2); contrast s. 8 (1) (*e*) with s. 16).

In the case of a deposit contributor these benefits are suspended if the amount standing to his credit is exhausted,[1] except that in such a case the right to medical benefit and to sanatorium benefit continues to the end of the then current year; if the deposit of a disabled depositor becomes exhausted towards the end of the year this is a poor consolation (s. 32 (1) (*b*)).

The right to sickness, disablement, or maternity benefit does not begin before the expiration of a fixed period after the first entry into the insurance scheme (described as the waiting period) and the payment of a fixed number of contributions. In this respect also the deposit contributors are in a worse position than the members of approved societies (s. 8 (*b*) (*c*) (*d*) (*f*)).

While a person is entitled to sickness benefit and during the succeeding fourteen days (which period may be extended by an order of the county court judge) no distress can be levied on goods belonging to him and being on premises occupied by him (s. 51).

4. **Reduction, Modification, or Forfeiture of Normal Benefits in Individual Cases.**—The normal benefits are subject to reduction, modification, or forfeiture by reason of any of the following circumstances:

[1] The account is, of course, debited with all payments in respect of sickness, disablement, and maternity, and in addition to that each depositor is debited at the beginning of each year with a sum fixed by the health committee representing the share of each depositor in the cost of medical benefit, sanatorium benefit, and management expenses (s. 32 (1) (*a*) (*d*) (*e*) (*f*)).

(*a*) *Age.*—A person under the age of sixteen or above the age of seventy has no right to sick benefit or disablement benefit (s. 8 (3)); a male unmarried person under the age of twenty-one is to receive sickness or disablement benefit at the rate of 5*s.* only, a female unmarried person under that age at the rate of 4*s.* only (s. 9 (1)). A person who has reached the age of fifty, and has not paid at least 500 contributions, upon becoming entitled to sick pay or disablement pay receives payment at a reduced rate (s. 9 (3)).

(*b*) *Low Wages.*—Where the sick benefit or disablement benefit would, if paid, exceed two-thirds of the usual wages, a reduced payment is to be made, but the equivalent of the reduction must be supplied in the shape of other benefits [1] (s. 9 (2)).

(*c*) *Receipt of Board and Lodging during Illness.*—While the employer of an insured person provides him with board and lodging, such person is not entitled to sick pay or disablement pay (s. 8 (7) (*e*)).

(*d*) *Receipt of Maternity Benefit.*—An insured woman entitled to maternity benefit is not entitled to sick pay or disablement pay during the first four weeks after her confinement (s. 8 (6)).

(*e*) *Treatment in a Workhouse or Hospital.*—An inmate of a workhouse, hospital, asylum, infirmary, or sanatorium is not entitled to sick or disablement benefit, but the whole or a part of the weekly payments must be paid to his dependents if there are any; in the case of a person who is an inmate of a sanatorium established under the new scheme, and has no dependents, the whole of the weekly payments must go to the local health committee (s. 12 (1) (2) (3)).

(*f*) *Foreign Nationality.*—In the case of an alien no subsidy is received from the Government, and the sickness, disablement, and maternity payments are accordingly reduced in the case of a male to seven-ninths, and in the case of a female to three-quarters of the payments to which such person would otherwise be entitled; his right to medical and sanatorium benefit is also restricted in consequence of the fact that no contribution to the expense of such benefits is made out of Government funds. An alien is not entitled to join an approved society, and must accordingly become a Post Office depositor (s. 35).

(*g*) *Residence outside of the British Isles.*—A person resident either temporarily or permanently outside the British Isles is not entitled to any benefit except with the consent of the society or committee concerned. It is not clear how this section will apply to sailors or fishermen employed outside the territorial limits.

(*h*) *Entrance into Insurance at Late Period.*—During the first twelve months after the new scheme comes into operation any person may join

[1] A similar reduction *may* also be made in all other cases; as in the case mentioned in the text, the measure of the reduction depends on the discretion of the society or committee administering the benefit; the distinction between the "may" and the "must" is not quite intelligible.

it. After the expiration of this period a person who becomes subject to compulsory insurance at a later age than sixteen has to submit to a reduction of benefits or to the payment of an increased contribution, or of a capital sum.[1] This rule does not apply to a person who has used the interval between the completion of his sixteenth year and the payment of his first contribution for the completion of his education.

(*i*) *Effect of Default in Payment of Contributions.*—Default in the payment of contributions may have the effect of causing the right to benefits to be suspended; where the arrears are not sufficient to cause a suspension the sick benefit is reduced, but the reduced weekly payment may not in any case be less than 5*s*. In the computation of arrears the period of any disablement caused by sickness is not taken into consideration, and in the case of a female entitled to maternity benefits in her own right the period beginning two weeks before and ending four weeks after her confinement is taken as the period of disablement.

A depositor's right to benefits cannot be suspended in his lifetime whilst any sum remains standing to his credit, but his sick pay is reduced in the same way as the sick pay of a member of an approved society who is in arrear, but whose right to benefits has not been suspended (s. 10).

(*j*) *Effect of Right to Compensation under any Statutory Rule or at Common Law.*—Where an insured person is disabled under circumstances which entitle him to a claim against another person under the Workmen's Compensation Act, 1906, or the Employers' Liability Act, 1880, or at Common Law, the sick pay or disablement pay ceases unless the value of the claim is less than the value of such pay, in which case only such part of the pay is due as will make up the deficiency (s. 11).

5. **General Reduction of Benefits.**—A general reduction of benefits may take place in respect of the members of any approved society if the valuation of the society's assets and liabilities shows a deficiency which necessitates the adoption of a scheme for such reduction. Such a scheme must have the approval of the Insurance Commissioners, and may provide for a reduction of the rate of sickness benefit or maternity benefit, or for a shortening of the period during which sick pay as distinguished from disablement pay is payable, or for a postponement of the date at which such payment begins. The scheme must be prepared with the intention of covering the deficiency within three years, and if this object be attained the reduction will, of course, cease after the lapse of that period (ss. 29, 31 (1) (*b*) ii to iv).

6. **Additional Benefits.**—There are two kinds of additional benefits which may be provided for the members of approved societies:

(*a*) A society may by means of a scheme requiring the approval of the Registrar of Friendly Societies provide that its funds—as existing at the date

[1] In the case of a person who, when becoming entitled to the benefit, has reached the age of fifty years, a further modification may take place under the operation of the rule referred to *sub* (a).

at which the National Insurance Act comes into operation—shall be used to provide benefits in addition to the normal ones (s. 55).[1]

(*b*) If on the valuation of assets and liabilities a surplus is found to exist, and such surplus is not required for making good any deficiency shown by any branch,[2] a scheme requiring the sanction of the Insurance Commissioners may direct such surplus to be applied for the purpose of providing additional benefits for the members.

The additional benefits in either case may consist of increases in the payments, allowances in cases of convalescence, assistance to members in distress, medical treatment of dependents, etc. (ss. 30, 8 (1) (*f*)).

In the case of Post Office depositors a surplus in the valuation is not available for additional benefits, but it may be credited to the accounts of the several depositors *pro rata* of the contributions paid by them respectively, with the result that there is less chance of the deposit becoming exhausted. The living depositors in this manner take the benefit of the amounts standing to the credit of deceased depositors, which on such death become forfeited (s. 32).

7. **Liability of Insured Persons to Fines for Breach of Rules.**—The rules of any approved society may, subject to the sanction of the Insurance Commissioners, provide for the suspension of benefits and the infliction of fines in the case of any member guilty of any breach of the said rules; but the Bill imposes limits as to the duration of the suspension and as to the amount of the fine, and also requires the rules as to behaviour during disease or disablement to be in a prescribed form. It also provides that the suspension of sick pay or disablement pay on the ground of the disease or disablement having been caused by the insured person is not to be accompanied by the forfeiture of the medical benefit (s. 13 (2) (4)).

Similar rules have to be made by the health committee for the guidance of the Post Office depositors (s. 13 (3)).

8. **Liability to Levies.**—Where the valuation of the assets and liabilities of an approved society shows a deficiency, the deficiency, as mentioned above, may be covered by a reduction of benefits; but it is equally within the power of the society, subject to the consent of the Insurance Commissioners, to make a compulsory levy among the members of the society or of the branch (ss. 29, 31 (1) (*b*) i.).

9. **Method of Enforcement.**—Each contribution payable by a person subject to compulsory insurance is in the first instance to be paid by the employer, and he is entitled to recover the employee's share either by deduction from his wages or in some other prescribed way (s. 4 (1) (2)).[3]

[1] The scheme may, instead of providing for additional benefits, provide for the reduction of contributions (s. 55 (1) (*b*) (*c*)).

[2] There is a corresponding provision as to the application of the surplus of any branch.

[3] There are cases where the employer has to pay his share of the contribution of an employee who is under no compulsion to insure, and does not, in fact, insure (see s. 4 (5)).

If a person generally subject to compulsory insurance is temporarily unemployed he is under no compulsion to continue his contributions, but if he wants to avoid arrears he must pay the whole of the contribution himself (s. 4 (3)).

If the employers fail to make the payments due from them they are liable to a fine, and they may in any case in which the person concerned is a member of an approved society be ordered to pay an amount which will enable such society to allow to such member the same benefits as if the contribution had been paid (s. 52 (2) (3)).

III. Voluntary Insurance.

Voluntary insurance is only possible for persons who are admitted by an approved society; any person who obtains such admittance and who is engaged in some regular occupation and is wholly or mainly dependent for his livelihood on the earnings derived from that occupation can become a voluntary insurer, and any person who for at least five years has been subject to compulsory insurance may become a voluntary contributor, whatever his occupation may be and even if he has no occupation; and in the same way any voluntary contributor who has been a voluntary contributor for five years may continue his insurance notwithstanding the fact that he is not in any way dependent on his earnings.

It is important to realise what this means. It means that a person who derives the bulk of his income from a salary or from the profits of business —however large that income may be—is entitled to be insured against sickness with the benefit of the State subsidy; it further means that any person who during five years has lived on a salary or on the profits of business, but afterwards inherits a fortune and retires from work, is equally entitled to the benefit of the State subsidy.

The only persons who cannot be or become voluntary contributors are married women (s. 34 (4)).

The rate of the contributions of the voluntary contributors are not as yet fixed; they will be fixed in accordance with a table to be prepared by the Insurance Commissioners at a rate appropriate to the age of entrance into the scheme, but a person who has been subject to compulsory insurance for five years and subsequently becomes a voluntary contributor has only to pay at the rate payable by employed contributors. Voluntary contributors have to pay the whole contribution even where there is an employer; for instance, in the case of a clerk whose salary exceeds £160 a year, the employer pays no share of the contribution (s. 5).[1] A person below the age of forty-five who enters into insurance within six months after the commencement of the Act must be accepted with contributions at the employed rate.

Children below the age of sixteen can become contributors; in such

[1] As to the rules applied in the event of a voluntary contributor becoming subject to compulsion and *vice versa*, see s. 6.

a case only a limited amount is credited in each year to the society to which the child belongs, or (in a case in which the child is a Post Office depositor) to the child (s. 38); while the child is below the age of sixteen it is not entitled to any benefit other than medical benefit and sanatorium benefit (s. 8 (3)). The memorandum says that the balance of the children's contributions "is being accumulated in order to enable the whole scheme to be extended at an earlier date than would otherwise be possible."

The benefits of voluntary insurance are the same as those of compulsory insurance.

IV. Duties of Insurance Authorities in Relation to Public Health.

The local health committees in addition to their functions as administrators of the sanatorium benefits on behalf of all insured persons and as administrators of the other benefits of insurance on behalf of the deposit contributors are also entrusted with general duties relating to the public health of those under their respective jurisdiction. Each committee has to consider the hygienic needs of its special area and to make such recommendations as may result from such consideration. It has also duties of an educational nature, being empowered to provide for lectures and the publication of literature relating to all matters affecting health (s. 44 (1)).

A special duty is imposed on each approved society as well as on each health committee in any case in which it is found that the sickness among its beneficiaries is excessive, and that such excess is due to bad housing or insanitary conditions or to the neglect of any employer or any public authority to comply with the statutory duties affecting such employer or such authority. In such a case the society or committee may apply to the Local Government Board for an inquiry, and if on such inquiry it is found that within the period specified in the Bill the amount of sickness in the particular area has been in excess of the average expectation of sickness by more than 10 per cent., and was caused by any of the circumstances mentioned, an order may be made requiring the loss arising to the society or committee by reason of such increased rate of sickness to be made good by the person or authority who is found to be in default (s. 46).[1]

C. MATTERS CALLING FOR CRITICISM.

1. Effect on Existing Institutions.

In considering the effect of the bill on existing institutions we naturally think in the first instance of the friendly societies. At first sight one is struck by the advantages which are conferred on the more important of these

[1] The provision contained in s. 17, by which approved societies are authorised to subscribe to hospitals or for the support of district nurses, may also be mentioned in this connection, but as these may also be paid out of special funds, the receipt of which is uncertain, no great importance can be attached to it.

societies. They will of course become approved societies and their members will have all the benefits of the State subsidy and will either have their contributions reduced or receive additional benefits; and moreover, in so far as they are employed contributors, they will only have to pay a part of the contribution, the other part being paid by the employer. The reserve which they now hold to cover the current risk will be released at once and may be applied to the provision of additional benefits, and though this will at first reduce the amount of the contributions placed to their credit, they will ultimately get the full benefit of the contributions of their members. They will be represented on the health committees and therefore have a part in an important branch of the local government activity. As their members under the scheme receive much more advantageous treatment than the deposit contributors, it is to be assumed that every person compelled to insure who can possibly obtain admittance to a friendly society will seek for such admittance and that consequently the membership will largely increase. It is obvious that the advantages are not given to them as free gifts; they have to surrender their liberty and their individuality; for the friendly society of the Bill will not have much in common with the friendly society which we have known for so many years. In so far as it has members who are not compulsorily or voluntarily insured under the State scheme it may, of course, continue as before, but in so far as it provides insurance under the State scheme it is entirely dependent on the Insurance Commissioners. On the approval of these officers the existence of a society for the purposes of the State insurance is dependent and they may at any time withdraw such approval. They receive and invest all the contributions; they have to be appealed to for the sums required to provide the benefits; they have to determine what security each society has to give, and to approve every rule and every scheme affecting the members. A direct power of control is given them by a provision contained in s. 41 (3), which so far seems to have attracted very little notice. That provision enables the Commissioners to appoint inspectors with powers similar to those exercisable by inspectors appointed under s. 76 of the Friendly Societies Act, 1896. Under that Act inspectors can only be appointed upon the application of a large number of members of a society, and the application must be supported by evidence showing to the satisfaction of the Chief Registrar that there is good ground for the appointment, but under the present Bill such an inspector can be appointed at the unfettered discretion of the Commissioners.

The disappearance of the smaller societies will not be a matter of much regret, though it may cause serious loss to individuals; the minor matters as to which complaints have been made on the part of friendly societies are probably capable of adjustment. They dwindle into insignificance beside the fact that as to the principal part of their business the friendly societies will lose their individual character and their liberty. If they are satisfied with that, there is nothing more to be said as far as they are concerned.

The second great institution which will be seriously interfered with if the Bill is passed in its present form is the medical profession. It has been estimated that four-fifths of the adult population of the United Kingdom will become insured under this Bill and therefore entitled to free medical attendance and free medicines in case of illness: that is to say, a large part of the population will cease to have recourse to medical aid on their own account. At first sight this arrangement appears to have some undoubted advantages. There is a large class of the population who now obtain gratuitous medical aid at the hospitals without being in need of charitable assistance. A large proportion of persons belonging to that class will be compelled by means of their contributions to the insurance funds to pay at least for part of such medical aid. To many medical practitioners it will also seem advantageous to be assured of a regular income as medical officers of a society or of a health committee instead of being dependent on the many uncertainties of private practice; but here, as in the case of friendly societies, a closer inspection of the scheme shows that these advantages are to a large extent illusory, and that they are outweighed by disadvantages of a serious nature. I had arrived at this conclusion partly from my own judgment and partly from a knowledge of the great difficulties which have arisen in Germany as to the relation of the medical profession to the sick funds, difficulties for which no successful remedy has as yet been discovered, but I am now confirmed in my views by the perusal of an article in *The Times* (May 22, p. 9) communicated by the Secretary of the British Medical Association, and by some notes kindly furnished to me by my friend Dr. Charles Gray. On the other hand, a communication was made to *The Lancet* suggesting that the medical profession was under a false impression; that there would be a large capitation grant, and that there would also be a free choice of doctors. I do not quite see how a capitation grant and a free choice of doctors can work together, but in any case I do not understand on what basis these prophecies are made, inasmuch as the Bill leaves an entirely free hand to the societies and health committees. They are only hampered in respect of the supply of medicines, which a medical practitioner may not undertake for an inclusive fee without the consent of the Insurance Commissioners. Otherwise they can make such arrangements as they think fit. The past experience of the medical arrangements of the friendly societies has been unsatisfactory; the cheaper man seems to have had the best chance of being appointed without much regard to the quality of his work, but sometimes a good man has accepted employment at a cheap remuneration as it helped him to enlarge his practice in other directions: as the Bill will draw into its net most of the persons from whom such additional practice was obtained the inducement will cease to operate, but competition will still drive down the remuneration. Thus a large number of medical practitioners will be employed at a low remuneration, while others will lose all chance of employment. The fact that the selection of the practitioners to be employed is to be in the discretion

of boards and committees—who, as is well known, are frequently influenced by one or two of the members—and the undesirable habits which this circumstance will create have also to be considered. The want of adequate representation on the bodies which have to administer the insurance scheme is another source of complaint. All the questions I have touched upon require careful consideration, and I have no doubt the medical profession will not fail to give such consideration. What I have said of the friendly societies also applies to the doctors; if they are satisfied, there is nothing more to say as far as they are concerned. But I now come to other matters concerning the community as a whole.

2. Does the Bill Deal Justly as between the Different Classes of Insured Persons?

This question must be answered with an emphatic "No." There are several classes of the population who are treated most unjustly and most unkindly. I will deal with them seriatim.

(*a*) **Position of Voluntary Insurers.**—It must be remembered that some of the poorest classes of the population are not employed under contracts of service or apprenticeship, and therefore are not subject to compulsory insurance; they include charwomen, laundresses, gardeners, boatmen, fishermen, luggage carriers working on their own account, small shopkeepers, small farmers, labourers in casual employment, hucksters, costermongers, and others, also wives and daughters working for husbands or fathers without remuneration, travelling agents, and others with net incomes ranging between 10*s.* and 20*s.* a week. If these persons want to insure they have to pay the whole of their contributions, and while every employed contributor who enters into insurance within twelve months after the commencement of the Act, whatever his age may happen to be, can insure at the same rate and obtain the same benefits as a person who joins at the age of sixteen, a voluntary insurer whose age is over forty-five at the commencement of the Act has to pay contributions at a rate appropriate to his age. Even if he is less than forty-five years old, he has to pay the graduated rate unless he becomes insured within the first six months. Moreover, if he cannot find admittance to an approved society he is cast out into utter darkness. No State subsidy is available for a charwoman or a gardener who has some defect or weakness preventing admission to a friendly society.

(*b*) **Position of Deposit Contributor.**—The deposit contributor is another stepchild of the insurance scheme. A person who, owing to his condition of health or some other cause, cannot be admitted to the membership of an approved society belongs to that class, if he is subject to compulsory insurance; in that case his contribution is credited to him personally and his right to sick pay and disablement pay ceases if the amount standing to his credit is insufficient to pay the seven-ninths or three-fourths which have to

come out of contributions. It is clear that any prolonged illness must soon exhaust the deposit; but if such a depositor is lucky enough to die without having been ill, the whole deposit goes into the insurance fund. As the forfeited amounts are every three years credited to the depositors *pro rata* of their contributions, depositors whose illnesses are of a short duration may ultimately hope to derive some benefit from the insurance outside of the free medical aid and the sanatorium benefit, but this is a poor comfort for the present generation. A person not subject to compulsory insurance and unable to be admitted by an approved society cannot become a Post Office depositor. The needlewoman or the gardener or the small shopkeeper who owing to some physical defect or some other unpreventable cause is excluded from the societies is thus left out altogether; whenever such a person drinks a cup of tea or smokes a pipe of tobacco she or he has the proud feeling of contributing to the insurance scheme without having the smallest prospect of benefiting from it.

(*c*) **Married Women.**—A married woman who was insured before marriage and who on her husband's death becomes again subject to compulsory insurance is treated pretty fairly, but a married woman who takes up an occupation which is not within the scope of compulsion is unfortunate indeed. Even if before marriage she was under compulsion, she cannot while married become a voluntary insurer, and all her former contributions are thrown away unless she becomes subject to compulsion as a widow. A woman may have earned wages as a domestic servant or as a factory hand before her marriage. If her husband has a small shop she would, of course, help in the shop and on her husband's death continue to carry on her husband's business; if she is then over fifty years old the rate of voluntary insurance is almost prohibitive even if she is accepted by an approved society; if she is not accepted she is outside of the insurance altogether and receives no advantages from it herself, while her former contributions are benefiting others.

(*d*) **Position of Persons over the age of Seventy.**—Sickness benefit and disablement benefit cease when a person attains the age of seventy. If such a person is disqualified from an old age pension he has no claim except the claim to medical benefit. The sanatorium benefit cannot, as a rule, be of use to any person of that age. The mischief caused by this rule will no doubt be mitigated to a certain extent by the Amending Bill, which will eliminate some causes of disqualification, but others will remain, and it seems clearly unjust that at an age when a man is most in need of assistance his insurance should be of no advantage to him.

(*e*) **Position of Employers.**—The rule under which an employer who pays less than 15*s.* a week to an employee over the age of twenty-one, and not provided with board and lodging, has to pay a larger share of the contributions is as unjust as the other rules which I have criticised. To assume that this will stop or mitigate sweating is absurd. The sweating employer

will know how to relieve himself of the burden of the extra payment, but, leaving him aside, the cheapest labour is so much the least remunerative to the employer that in many cases the hiring of such labour is a form of disguised charity, and there is no reason whatever that can justify an unfavourable discrimination in such a case.

(*f*) **Uniformity of Contributions and Benefits.**—At first sight the uniformity of contributions appears to have distinct advantages, but here again a little further consideration shows that this *prima facie* appearance is deceptive. In the case of persons receiving low wages the high percentage of the sick pay offers a great inducement to malingerers, and the discretionary power given to societies and to health committees in such cases to reduce the pay is not a sufficient remedy. But apart from this it seems quite unreasonable that a person earning £3 a week should not be able to procure himself larger benefits than a person earning £1 a week or less.

(*g*) **Position of Domestic Servants.**—The case of the domestic servant who is deprived of sick pay because he or she is not removed from the master's house has been so much discussed that I will not dwell on it. But I think that I have shown that the scheme as it stands is highly unfair and unjust as between different classes of persons coming under the insurance. I now have to examine the question whether the scheme is fair as between the insured persons and the general taxpayer. Here again the answer must be in the negative.

3. Is the Scheme Fair as between the Insured Persons and the General Taxpayer?

I do not wish to enter into a discussion as to the wisdom or justice of the grant of a State subsidy, as this is a point on which there is a considerable diversity of opinion, and as, moreover, the country has practically made up its mind to the granting of a State subsidy, but taking it for granted that a State subsidy has to be provided it is of the highest importance that it should not be taken advantage of by persons who are abundantly capable of insuring themselves at their own expense. The Bill establishes no limit of income either for compulsory or for voluntary insurance. A man doing manual work who earns £5 or £6 a week under a contract of service is bound to insure; a clerk in a bank with a salary of £160 a year and a private income of £500 or £1,000 a year is bound to insure whatever his private income may be. A person who earns £500 or £1,000 or £10,000 by his employment or in his business or profession and lives on that income is at liberty to insure at the rate for voluntary insurance; but if such a person or any other person has been insured under compulsion for five years he can continue to insure at the rate for compulsory insurance. The last-mentioned provision requires particular attention. A young lad who is engaged as a clerk in a bank at the age of sixteen will hardly receive a salary exceeding £160 before he completes

five years' service. After that he may become a manager with £3,000 a year or inherit a private fortune and keep a pack of hounds in the country, yet he will be entitled to the benefit of the cheap rate of insurance of the State subsidy and of free medical treatment. It will be said that persons in a good social position will not take advantage of these rules. That may be so, but there are plenty of well-to-do people who, whether because they have no social position or because they are incapable of foregoing any pecuniary advantage to which they are legally entitled, will disregard any disparaging remarks that may be made and take their 10*s.* sick pay without flinching. The small tradesman who has to pay his rates and taxes, and who, not being able to obtain admission to a friendly society, has to remain uninsured, ought not to be called upon to pay any share of the State subsidy granted to such people, and in fact I do not see why you or I should be called upon to do so. No person whose total income from all sources exceeds a certain maximum amount, say £300, ought to be insured under the State scheme either voluntarily or compulsorily.

4. Are the Burdens which the Insurance Scheme involves of a Limited or Calculable Character?

The actuarial report published a few days ago estimates the cost of the State subsidy at nearly two million pounds in the first financial year in which the Bill is to come into force, at over three and a half million pounds in the next year, and at over four million pounds in the year after that. This estimate includes the sums paid to the approved societies for the Government's share in the cost of the benefits and the administration expenses; but it does not include either the contribution towards the benefits supplied to the deposit contributors or the additions, or the State expenses which will be necessitated by the salaries of the Commissioners and the staff employed by them, or of the numerous new employees who will be required in the Post Office for the purpose of dealing with the new work which the insurance scheme will create. There will be also a considerable addition to local expenditure in connection with the work of the health committees and the officials employed by them. The expenses of the health committees in connection with the supply of the medical benefit are, in the first instance, taken out of the fixed allowances out of the Post Office fund; but if these allowances are insufficient, the deficit is to be covered as to one-half out of local and as to the other half out of State funds. There is, therefore, here the possibility of another addition to State expenditure and local expenditure. It will, no doubt, be said that against these uncertain elements in the cost of the scheme must be set the uncertain elements in the gain arising out of the probable saving of expenditure for poor relief. The German experience does not bear this out. In the expressions of opinion obtained from a number of anonymous informants in Germany, it is

universally admitted that the poor-law expenses have increased since the introduction of compulsory insurance, though this increase is ascribed to other causes. It is generally believed, as also seems probable on *a priori* grounds, that the increase in the poor-law expenses would have been much more serious if there had been no compulsory insurance; but there are no available statistics by which this can be proved generally. The only statistical information concerns the recipients of disablement benefit, and they show undoubtedly that the great majority of the annuitants do not become chargeable to the poor-law authorities (see *Monatsblatter für Arbeiterversicherung*, 1911, p. 62); but as for the present purpose the only question is whether there will be an actual decrease of poor-law expenditure, the German information cannot be referred to as giving any grounds for a hopeful view. It must be remembered, in this connection, that the class of persons which is most likely to become chargeable, namely, the class which no approved society will admit, will derive very little benefit from the insurance scheme.

Another matter which cannot be overlooked in this connection is the fact that a demand will infallibly spring up, just as it did in Germany, for a provision for the widows and orphans of insured persons, and that it will not be possible to resist that demand. This will involve a considerable increased State subsidy; and if all these circumstances be taken together it will be seen that the amount of the future expense of the insurance scheme cannot be foretold with any reasonable certainty.

5. Will the Scheme Disappoint the Expectations which it has Raised?

There seems to be a widespread idea that the adoption of the scheme will remove a large part of the causes of poverty, and that the large powers given to the health committees will enable them to improve the hygienic conditions of the population to an extent which will materially diminish disease. As regards the first part of this programme, I think that I have shown that a large part of the poor inhabitants of the country are either left out entirely or derive very little advantage from the insurance, and that, therefore, these expectations cannot possibly be realised to their full extent; nor ought it to be forgotten that many persons will be left out on the ground that they have fallen into arrear with their contributions, or that the arm of compulsion has not been able to reach them. The power over the employers is useful enough where large employers are concerned; but the small tradesman or farmer who employs one man, the householder who employs one servant, is not so accessible. The number of persons who, owing to their own neglect or improvidence, or owing to the neglect of their employers, will be left without the benefits of insurance will be probably much larger than the framers of the scheme anticipate. The

question as to malingering is also of importance in this connection. The increase in the number of the members of the approved societies will render control less easy, and as the funds which the societies will administer will not be their own funds in the same sense as under the present voluntary system, the motives for severity will not be quite the same. This may cause levies or reductions of benefits, which will be another cause of disappointment. As regards the powers of the new health committees, it remains to be seen whether their powers will be exercised more efficiently than those of the health committees appointed at the present time by the various local authorities, or whether the overlapping of functions which the creation of the new sanitary authorities will bring about will not lead to friction and waste. The many new appointments will be coveted by many more persons than there are vacancies for, and the unsuccessful candidates will swell the chorus of complaint raised by those whom the carrying out of the scheme has disappointed. This cannot, of course, be avoided, but if such causes of disappointment as can be avoided were removed, the dissatisfaction could be kept within narrow limits.

D. COMPARISON WITH THE GERMAN SCHEME OF INSURANCE.

In the several memoranda issued by the Government the German scheme is used in two different ways. It is appealed to as an illustration of the success of a scheme of compulsory insurance, and on the other hand the superiority of the new proposals over the German scheme is insisted upon. In support of the first-mentioned method of argument the authority of a number of German witnesses, mostly anonymous, is invoked; but the greater part of these speak of workmen's insurance generally, and do not differentiate between the three kinds of insurance; and, moreover, they speak in such general terms that their testimony is not of much value. There can be no doubt that the German workmen's insurance as a whole has worked satisfactorily; but there is one branch in the working of which there has been a great deal of friction, and which, therefore, cannot be taken as a model, and that is the insurance of temporary sickness. The friction has been due to two causes: (1) to the dissatisfaction of the medical profession; (2) to the fact that in the administration of the so-called local funds (in which over six million persons—more than one-half of the total number—are insured) the workmen's representatives, who have two-thirds of the votes, have the preponderant power—and have used the large patronage which they control exclusively in the interest of the Social Democratic Party; no man who is not a member of that party need apply for any salaried office. The Consolidation Bill, which has now passed the second reading, has introduced some modifications trying to remedy these evils, and these were carried, notwithstanding the acrimonious

protests of the Social Democratic members; but a violent agitation in the country is threatened, and a peaceful working of the new law as regards sickness insurance is not assured. The insurance against invalidity and old age has not been modified in any essential particular by the Consolidation Bill, except that the insurance of widows and orphans has been added with a corresponding increase of contributions. This part of the insurance scheme has worked extremely satisfactorily. There has not at any time been a serious demand for the unification of sickness insurance with invalidity insurance; the separation is founded on good reasons; the sickness insurance is extremely elastic, allowing for a considerable margin both as regards contributions and benefits. The variety of the scale of contributions (which are fixed by a percentage of the wages) is shown by the following figures: In 1908 the contribution was less than $1\frac{1}{2}$ per cent. of the wages in the case of nearly 5,000 funds and societies, between $1\frac{1}{2}$ and 2 per cent. in the case of about 3,800, between 2 and 3 per cent. in the case of about 9,150, between 3 and $4\frac{1}{2}$ per cent. in the case of 3,637, and between $4\frac{1}{2}$ and 6 per cent. in the case of 206. The variety of benefits to a large extent corresponds to this variety of contributions. On the other hand, invalidity insurance in each class of insurance has a uniform scale of contributions and of benefits. The benefits of sickness insurance are entirely independent of the length of insurance, whilst in the case of invalidity insurance the amount of the benefit is largely dependent on the number of contributions received.

The proposed British system, with its uniform rates of contributions and benefits, not even dependent on the wages of the insured persons, is so entirely different from the German system that I do not see how the success or non-success of the one can furnish any guidance as to the probabilities of the success or non-success of the other. For the same reason the tabular comparisons as to the cost to workpeople and employers contained in one of the last-issued memoranda are entirely misleading. It is useless to tabulate the cost without in each case comparing the value of the benefits with the cost. There is, of course, one fact which increases the comparative cost of the German insurance; it is connected with the circumstance that Germany has no class of outcasts who are excluded from insurance in the proper sense of the word, as the deposit contributors in the British scheme. The fact that in this country only selected lives are to be insured naturally reduces the rate of contributions; moreover, the German invalidity insurance is at the same time an old age insurance, whilst under the British scheme persons over seventy are excluded from the principal benefits. Finally, it must be noted that the rate of insurance for sickness has increased considerably from year to year, and it remains to be seen whether the British rate of contributions, which is founded on an estimate which is partly based on very uncertain data, will be found sufficient to provide for the promised benefits.

It is stated in Mr. Lloyd-George's memorandum that the German system

is much more bureaucratic than the proposed British system; but, as regards sickness insurance, this is not in accordance with the facts. The communal funds, in which about one-tenth of the total number of persons coming under the sickness insurance law are insured, are managed in connection with the other business of the particular local authority, but all the other funds are managed by societies which, within the limits allowed by the law, are entirely autonomous. There is no central authority like the Insurance Commissioners placed in authority over the sick funds. The Imperial Insurance Office has dealt with invalidity insurance and accident insurance, but has no jurisdiction in anything pertaining to sickness insurance. The approved friendly societies which still exist in Germany, and insurance with which is deemed equivalent to insurance with one of the statutory funds, have to comply with certain conditions for obtaining their approval, but having complied with these conditions are free from any control. Notwithstanding the fact that the employer pays no part of the contribution, there are still about a million persons subject to compulsory insurance who are insured with these societies. The new law will alter this, but for purposes of comparison the present law can alone be considered. To sum up, the German systems of invalidity and sickness insurance are so totally different in all their methods and arrangements from the proposed British system that they cannot be appealed to as examples, and still less can their assumed imperfections be used as arguments for the superiority of the new proposals.

E. CONCLUDING OBSERVATIONS.

I do not wish to trespass any longer on your patience. I think I have shown that the Bill in its present form is neither just to the classes who are to be benefited by it nor to the general taxpayer, and that if carried without material alterations it will infallibly lead to universal disappointment. I have also tried to make it clear that there is nothing in the German experience which could in any way modify the line of criticism which I have taken. In my opinion—which I believe is shared by some friends—the difficulties experienced in Germany as to the working of the sickness insurance scheme point to the conclusion that insurance against temporary sickness ought to be left on its present voluntary basis, but I will not now attempt to justify that opinion or to explain it in greater detail; for the present I am only anxious to call upon every one who realises the importance of the subject to use every effort to prevent undue hurry and to secure full and complete consideration for the complicated proposals contained in the Government Bill.

ADMIRALTY JURISDICTION IN INLAND WATERS.

[*Contributed by* ALBERT GRAY, ESQ., K.C.]

S. 7 of the Admiralty Court Act, 1861,[1] is short and apparently clear: "The High Court of Admiralty shall have jurisdiction over any claim for damage done by any ship," and the expression "ship" is by s. 2 defined as including "any description of vessel used in navigation not propelled by oars." The language of s. 7 is unqualified: there is no mention of high seas, tidal waters, first bridges, or accessibility from the sea. What would the decision be if a suit were brought in an English Admiralty Court for damage done by a steam barge on an inland canal or river above tide, or by an excursion steamer on an inland lake? If the suit were brought in the Admiralty Division of the High Court, it might perhaps be held that for convenience the suit should be heard in that Division, especially if it turned upon the rules of navigation; but the question would be more neatly raised, if the action were brought in a County Court, upon a rule obtained in the High Court for a prohibition.

In showing cause against the rule, counsel would rest his case mainly upon the unqualified terms of s. 7. He would contrast its language with that of s. 6 of the Admiralty Court Act, 1840,[2] which gives the Court jurisdiction in claims for "damage received by any ship or sea-going vessel . . . whether such ship or vessel may have been within the body of a county or upon the high seas at the time," etc. He would argue that the Act of 1840 restored to the Court, in respect of the specified causes of action, the jurisdiction which it possessed before the statutes of Richard II.; while the avoidance in the Act of 1861 of any reference to high seas, tidal waters, or other locality, or to "sea-going vessels," manifested an intention on the part of the Legislature to go a step further, to give the Court jurisdiction which it may not have had before Richard II., and to substitute subject-matter or the navigability of the water as the test in place of tide. He would probably cite *Reg.* v. *City of London Court*,[3] in which, in my early days at the Bar, I unsuccessfully argued that admiralty jurisdiction under s. 7 did not extend to a collision within the Royal Albert Dock, a place not only within the body of a county, but also beyond the natural flow and reflow of the

[1] 24 & 25 Vict. c. 10. [2] 3 & 4 Vict. c. 65. [3] 8 Q.B.D. 609; 51 L.J. Q.B. 305.

tide. In that case the Court, upholding the jurisdiction of the County Court, observed: "The object and effect of the Act have been declared to be to confer upon the Court of Admiralty the utmost jurisdiction in cases of collision. This is the language of Dr. Lushington,[1] and his exposition of the statute was expressly approved by the Privy Council." The attention of the Court would also probably be invited to the judgments of the Supreme Court of the United States, by which the admiralty jurisdiction, inherited by the Federal Courts from England through the medium of the Constitution, has been finally asserted to depend, in cases of damage, upon the navigability of the water, irrespective alike of tide and accessibility from the sea. Counsel might even venture to quote *obiter dicta* of the American judges, who, while establishing that jurisdiction, observed that it did not seem to differ substantially from the contemporaneous English law as extended by the Acts of 1840 and 1861, and as expounded by Dr. Lushington.[2]

On the other hand, counsel in support of the rule would argue that the Victorian Acts were never intended to do more than restore what had been taken away by the Acts of Richard II. and by the malignant prohibitions of Coke; that the jurisdiction now to be exercised is still "admiralty" jurisdiction, *i.e.* confined in cases of damage to tidal water; that the Albert Dock case was in fact in his favour, a dock in a tidal river being merely an extension of the tidal limits; that express words would be required in the Act of 1861 to extend the jurisdiction to non-tidal waters; and, finally, that there was no case in support of such extended application of the Act of 1861.

However interesting the decision might be as an interpretation of the statute of 1861, it could have but little importance in this country, where there are few, if any, rivers navigable beyond tide, and where there is no great lake forming the boundary between this country and another.

The subject of admiralty jurisdiction in inland waters has, however, an interest for us, when we divert our minds from the little Kingdom to the big Empire. The Courts of Canada now exercise admiralty jurisdiction not only over all her inland waters, but over causes arising anywhere upon the Great Lakes, just as if they were high seas, the Federal Courts of the United States operating with similar powers on their side. Moreover, in recent years similar jurisdiction has been conferred by Order-in-Council (1902) upon the High Courts of Uganda and Nyasaland in regard to Lakes Victoria and Nyasa respectively. In all these cases the great lakes lie between British[3] and foreign territory, and in each the boundary line is drawn across the bed of the lake.

[1] In the *Malvina* (Lush. 493) Dr. Lushington said of the Act of 1861: "The terms 'sea-going vessel' and 'damage done within the body of a county' are not used; and I am glad they are not, for constant confusion has arisen from them. The utmost jurisdiction is nevertheless given to this Court in cases of collision."

[2] *The Eagle*, 8 Wallace 15.

[3] Not quite accurate as regards Africa, where the territory is Protectorate only.

The history of the American jurisdiction is to be found in the Reports of the Supreme Court, but is little known here because it is hardly adverted to in our English text-books, having little application, as we have seen, to English conditions. The Canadian jurisdiction was conferred by two successive Dominion Acts, but the circumstances and negotiations which led to the passing of those Acts are narrated only, so far as I am aware, in Canadian Sessional Papers.

I propose now to trace shortly the development of admiralty jurisdiction on inland waters in the United States and Canada respectively. The final result is much the same in both cases, attained first in the United States by a bold achievement of judge-made law, long subsequently in Canada by legislation.

The Treaty Boundaries.—By the Treaty of Paris, 1783, the boundary between the United States and Canada was declared to run along the middle of the Iroquois River "into Lake Ontario, through the middle of the said lake until it strikes the communication by water between that lake and Lake Erie, thence along the middle of the said communication into Lake Erie, through the middle of Lake Erie," and so on through Lakes Huron and Superior. The Treaty of Ghent, 1814, recited that "doubts have arisen what was the middle of the said river, lakes, and water communications, and whether certain islands lying in the same were within the dominions of H.B. Majesty or of the United States." Under the Treaty, Commissioners were appointed to designate the boundary afresh. The delimitation, in which latitude and longitude, as well as distances from fixed points were used, was concluded in 1822, and having now lasted nearly ninety years seems to have given satisfaction.

It has been provided by Canadian legislation that the boundaries of the lake provinces and the limits of the townships on the lake coasts extend to the treaty boundary,[1] and that boundary is recognised by the Courts on each side as the limit within which the municipal laws of America and Canada respectively prevail. Thus a licensing law of Ontario binds an American ship proceeding from or to a Canadian port,[2] and an American ship can be seized anywhere on the Canadian side of the line for breach of a Canadian Fishery Act.[3] A Court of Michigan, holding that American process could not be served on the Canadian side of the line, observed: "Thus Great Britain and the United States appropriated to themselves as part of their territorial domains the lakes and water communications on their respective sides of the boundary line as fully and unreservedly as the lands on either side. No distinction is made."[4] On the other hand the late Sir H. Taschereau,[5] referring to admiralty actions of damage, spoke

[1] See R.S. Ont. 1897, c. 3, s. 7.
[2] *R.* v. *Meikleham*, 11 Ont. 366.
[3] *The Grace* (1895), 4 Exch. Rep. (Can.) 283.
[4] *People* v. *Tyler*, 7 Mich. 164.
[5] *Monaghan* v. *Horn*, 7 Can. Sup. Ct. Rep. p. 436.

of Canada as being divided "for hundreds of miles from the United States by a now imaginary line across the water."

Statutory Admiralty Powers of the Federal Courts.—By the Constitution (Art. III. s. 2) judicial powers were given to the Federal Courts in "all cases of admiralty and maritime jurisdiction," without more.

The Judiciary Act of 1789, in defining the powers of the several Courts, gives to the District (Federal) Courts of the United States "exclusive original cognisance of all civil cases of admiralty and maritime jurisdiction, [including all seizures when they are made on waters which are navigable from the sea by vessels of ten or more tons burden . . . as well as on the high seas [1]]."

The only other statutory provision which it is necessary to mention is the Act of Congress of 1845 (c. 20), which enacts as follows:

> That the District Courts of the United States shall have, possess, and exercise the same jurisdiction in matters of contract and tort arising in, upon, or concerning steamboats or other vessels of twenty tons burden and upwards enrolled and licensed for the coasting trade, and at the time employed in business of commerce and navigation between ports and places in different States and territories upon the lakes and navigable waters connecting said lakes, as is now possessed and exercised by the said Courts in cases of the like steamboats and other vessels employed in navigation and commerce upon the high seas or tide waters, within the admiralty and maritime jurisdiction of the United States . . . saving, however, to the parties the right of trial by jury of all facts put in issue in such suits where either party shall require it: and saving also to the parties the right of a concurrent remedy at the common law where it is competent to give it, etc.

Judgments of the Supreme Court.—Until a short time before the Act of 1845 the Supreme Court held that the Federal admiralty jurisdiction conferred by the Constitution was the contemporaneous jurisdiction of the Admiralty Court in England. The position may be illustrated by judgments delivered by Story. The *Thomas Jefferson* [2] (1825) was a case of wages earned on a voyage between two ports on the Missouri river, "hundreds of miles above the ebb and flow of the tide"; and it was held that "in no sense can the wages be considered as earned in a maritime employment." The *Steamboat Orleans* v. *Phœbus* [3] (1837) was a dispute between part-owners, the vessel being almost entirely engaged on the upper waters of the Mississippi. "Though in her voyages she may have touched at one terminus in tide waters, her employment has been substantially in other waters. . . . The District Court has no jurisdiction over the steamboat involved in the present controversy, as she was wholly engaged on such interior voyages." Lastly, in *U.S.* v. *Combs* [4] (1838): "Our opinion is that in cases purely dependent upon the locality of the

[1] The words in brackets are omitted in the Revised Statutes of 1873 as being inoperative by virtue of the later decisions of the Supreme Court.

[2] 10 Wheat. 428. [3] 11 Pet. 175. [4] 12 Pet. 72.

act done it is limited to the sea and to tide waters, as far as the tide flows; and that it does not reach beyond high-water mark."

The first inroad upon that line of decisions was made by the case of *Waring* v. *Clarke*[1] (1847), the cause of action being a collision in the Mississippi River ninety-five miles above New Orleans. It was contended that the place was not tidal, but the judgment proceeded on the assumption that it was. The case raised for the first time the question whether the admiralty jurisdiction prevails where the place of collision is within the body of a county. The majority of the Court, in upholding the jurisdiction, dwelt largely on the language of the vice-admiralty patents issued in colonial days to the American governors. The common form included these words, "Throughout all and every the seashores, public streams, ports, fresh-water rivers, creeks, and arms, as well of the seas as of the rivers and coasts whatsoever, of our said provinces." The Court argued that the vice-admiralty patents must have been known to the makers of the Constitution, that the Vice-Admiralty Courts thus had a wider jurisdiction than the Admiralty Courts in England, and that the Acts of Richard II. were accordingly inoperative in America. On the other hand, one of the three dissenting judges (Woodbury J.) protested that all the American cases before the Revolution followed the English law, and quoted *Montgomery* v. *Henry*[2] (1780), where the Court admitted that if the transaction took place within the body of a county the Admiralty Court had no jurisdiction.

The decision in *Waring* v. *Clarke* was in no way governed by the Act of 1845, which applied only to the Great Lakes, but it went far to emancipate the Federal admiralty jurisdiction. The full emancipation was achieved in the leading case of *The Genesee Chief* v. *Fitzhugh*[3] (1851). This case, of great celebrity in America, was one of collision on Lake Ontario, and as falling within the terms of the Act of 1845, was brought in the District Court. There was a plea to the jurisdiction, and the Supreme Court had to pronounce upon the constitutionality of the Act of Congress. It became evident upon the argument that if the *Thomas Jefferson* and other earlier cases were rightly decided, the Act of 1845, in conferring a new jurisdiction on the Federal Courts, was unconstitutional. But the principle of the Act of 1845, which had been in operation for six years, was much too valuable to be thrown away, and thus the Court was constrained to find that the earlier cases had not been rightly decided, and that the Federal Courts had all along been possessed of jurisdiction on the lakes and non-tidal waters by virtue of the grant in the Constitution.

Some passages of the judgment of Taney C.J. will indicate the reasons on which it was founded:

> But if the Admiralty jurisdiction is confined to tide waters, the Courts of the United States over the waters in question can exercise nothing more than ordinary

[1] 5 How. 441. [2] 1 Dall. 49. [3] 12 Howard 443.

jurisdiction at common law and equity. And in cases of this description they have no jurisdiction if the parties are citizens of the same State. This being an express limitation in the grant of judicial power, no Act of Congress can enlarge it. And if the validity of the Act of 1845 depended upon the power to regulate commerce, it would be unconstitutional and could confer no authority on the District Courts. If this law therefore is constitutional, it must be supported on the ground that the lakes and navigable waters connecting them are within the scope of admiralty and maritime jurisdiction as known and understood in the United States when the Constitution was adopted.

The desired construction of the Constitution must therefore be founded upon general principles of expediency, and the historical argument must be got over. Accordingly the Chief Justice proceeds:

These inland lakes are in truth inland seas. Different States border them on one side and a foreign nation on the other. A great and growing commerce is carried on upon them between different States and foreign nations, which is subject to all the incidents and hazards that attend commerce on the ocean. Hostile fleets have encountered on them and prizes been made, and every reason which existed for the grant of admiralty jurisdiction to the general Government on the Atlantic Seas applies with equal force to the Lakes. There is an equal necessity for the Instance and for the Prize power of the Admiralty Court to administer international law, and, if the one cannot be established, neither can the other. . . .

Now there is certainly nothing in the ebb and flow of the tide that makes the waters peculiarly suitable for admiralty jurisdiction, nor anything in the absence of a tide that renders it unfit. If it is a public navigable water, on which commerce is carried on between different States or nations, the reason for the jurisdiction is precisely the same.

Turning to the historical argument, the judge admits that the English jurisdiction was confined to tidal waters; it was here sound and reasonable, there being no navigable streams in the country beyond ebb and flow of the tide. In England therefore tide water and navigable water are synonymous terms—in other words, the jurisdiction "is confined to public navigable waters." The invention in these passages of a new criterion whether or not the water is "public navigable water" is important, as it has coloured all the subsequent decisions in America. Inasmuch as the far greater part of the navigable waters of the original thirteen States are tidal waters, the Chief Justice concluded that—

The Courts of the United States therefore naturally adopted the English mode of defining a public river, and consequently the boundary of admiralty jurisdiction. . . . And as the English definition was adopted in our Courts and constantly used in judicial proceedings and forms of pleading, borrowed from England, the public character of the river was in process of time lost sight of, and the jurisdiction of the Admiralty treated as if it was limited by the tide. . . . It was under the influence of these precedents that the *Thomas Jefferson* was decided.

The Court further adopted the argument of the majority in *Waring* v. *Clarke*, that the American Vice-Admiralty patents had extended the jurisdiction beyond the tidal waters.

It was only to be expected that a judgment of this bold character would be dissented from by judges who stood out for pure law against expediency. A strong protest was on this occasion made by Daniel J., who expressed the view that the decisions in *Waring* v. *Clarke* and the present

> will be found to rest the admiralty powers, not solely upon the jurisdiction of the admiralty in England, but upon some supposed enlargement of the admiralty jurisdiction said to have sprung from the practice of the Vice-Admiralty Courts in the British Colonies . . . It has seemed to me to imply a palpable contradiction that there should be ascribed (and that merely by implication) to the Vice-Admiralty Courts (the creatures of the Admiralty) powers which the latter confessedly never possessed.

The full effect of the *Genesee Chief* judgment was not realised for some years. In *Jackson* v. *Magnolia*[1] (1857), which was a case of collision in the Alabama river two hundred miles above tide, Grier J., delivering the majority judgment in support of the Federal jurisdiction,[2] still regarded the Act of 1845 as operative and necessary:

> Consequently as Congress had never before 1845 conferred admiralty jurisdiction over the northern fresh-water lakes "not navigable from the sea," the District Courts could not assume it by virtue of this clause in the Constitution. An Act of Congress was therefore necessary to confer this jurisdiction on those waters, and was completely within the constitutional powers of Congress, unless by some unbending law of nature fresh-water lakes and rivers are necessarily within the category of those that are not navigable.

This judgment seems to proceed on false reasoning. The Constitution says nothing about waters "not navigable from the sea": those words appear only in the Act of 1789, and if the jurisdiction was not granted by the Constitution the Act of 1789 was itself unconstitutional.

Three judges dissented from this judgment. Campbell J., while not proposing to reverse the *Genesee Chief* decision, frankly stated his opinion that it was wrong:

> The lakes (he said) are not common highways for all nations, open to the ships of all, and exempted from the municipal regulations and control of any. The sovereignty over them belongs to the riparian proprietors in the same manner as the Rhine and Rio Grande rivers; and the American States and British Queen have respectively Courts to administer their laws within the limits of their several titles, to the middle of the lakes, against those who may offend against them. The jurisdiction of the Court of Admiralty cannot be supported upon the lakes as seas.

The view that the Act of 1845 was necessary was abandoned in *Hine* v. *Trevor*[3] (1866). This was a case of collision on the Mississippi near St. Louis, one of the ships being seized under a law of Iowa. The Court held that local law to be unconstitutional, and that "the admiralty jurisdiction as

[1] 20 Howard 296.
[2] Grier J. had been one of the dissenting judges in *Waring* v. *Clarke*.
[3] 4 Wallace 556.

conferred by the Constitution and the Judiciary Act of 1789 is not limited to tide water, but covers the entire navigable waters of the United States."

In *The Eagle*[1] (1868) it was finally decided not only that the Act of 1845 was inoperative, saving the provision giving trial by jury, but also that all the above-quoted words of the Act of 1789 from "including all seizures" were inoperative. On the strength of this decision those words were omitted in the Revised Statutes of 1873. This case is further interesting because it arose upon a collision in the Detroit river on the Canadian side of the water boundary line. It was contended that the cause of action arose in Canada, where there was no lien, and thus that the United States law could not apply. The Court, however, brushed away this argument, holding that the case was properly tried in the District Court "according to the practice and principles of Courts of Admiralty in this country, wholly irrespective of any local law." The treaty boundary was to be no bar to admiralty jurisdiction in cases of damage, Nelson J. adding, "Since the recent Acts of Parliament in England removing the ancient restrictions by the Common Law Courts upon the admiralty jurisdiction it seems to be exercised as freely and as broadly as in this country." His references are to Dr. Lushington's judgments in *The Diana* and *The Courier*.[2]

The only later decision on the main question that need be mentioned is that in *Ex parte Boyer*[3] (1883). This was a collision between two canal boats in the Illinois and Michigan Canal, within the body of Cook County, Illinois, the libellant's boat being bound from one place in that State to another place in that State. The Supreme Court upheld the jurisdiction of the Federal Court, on the ground that the canal was a highway for commerce between different States, and thus "public water of the United States." The judgment shows that navigability of the water may not be the sole test so far as American decisions have yet gone, the Court adding this caveat: "This case does not raise the question whether admiralty jurisdiction of the District Courts extends to waters wholly within the body of a State, and from which vessels cannot so pass as to carry on commerce between places in such State and places in another State, or in a foreign country; and no opinion is intended to be intimated as to jurisdiction in such a case."

Such is the history, in its main outlines, of the development of admiralty jurisdiction on inland waters in the United States.[4] The decisions by which

[1] 8 Wallace 15. [2] Lush. 539, 541. [3] 109 U.S. Rep. 629.

[4] It may be noted that "damage done by any ship," which in England, under the Act of 1861, extends to damage done by a ship to a pier or other structure, as a matter of admiralty jurisdiction, is not within admiralty jurisdiction in the United States (*Cleveland Terminal, etc., Co.* v. *Cleveland Steamship Co.*, 208 U.S. Rep. 316; *West* v. *Martin*, 97 P. 1102); although damage to a beacon, as a thing placed for purposes of navigation, has been held to be an admiralty cause (*The Blackheath* [1904], 195 U.S. 361). In the *Cleveland* case Fuller C.J. observed: "The proposition contended for is that the juris-

it was established were largely prompted by expediency, but how cogent was that expediency! But for those decisions ships navigating the lakes or the great rivers might be subject to the differing shipping laws of the adjacent States, and bound to obey rules of navigation of infinite variance.

The Canadian Jurisdiction.—The Canadian jurisdiction rests on legislation. The question seems to have been first seriously agitated in the year 1858. The earliest correspondence[1] to which I have been able to refer starts with April 5, 1861, when the Duke of Newcastle, Secretary for the Colonies, addressed a despatch to Governor Head, enclosing a letter from the Colonial Office to the Admiralty, and the Admiralty reply covering a letter from Mr. Rothery, the Admiralty registrar. All agreed that legislation was necessary, the Duke of Newcastle and Mr. Rothery suggesting an Imperial Act, the Admiralty a local Act.

Mr. Rothery in his letter of January 18, 1861, after pointing to the advancement of English law as shown in the Admiralty Act of 1840, proceeds: "But in Canada it appears that such a measure is even more necessary than in this country: the lakes are in truth nothing but inland seas, having on the north the British possessions, on the south the United States of America. As Mr. Black[2] justly remarks, if a collision occur on those lakes between an American and a British vessel the American may cause the British vessel to be arrested for the damage if she came into an American port, but the British owner cannot seize the American for the damage in a British port." It was suggested that Mr. Rothery should draft a Bill, but he threw the onus on the Canadian Government, and the despatch of April 5, 1861, went out with his recommendation that the skeleton bill should be drafted in Canada.

For some years nothing was done. At length, in December 1873, the Minister of Marine submitted a memorandum to the Canadian Government strongly urging the extension of the Vice-Admiralty jurisdiction to the lakes. The matter was again laid before the Colonial Office, and the Admiralty Registrar was again consulted. In his reply Mr. Bathurst (June 30, 1874), after observing upon the Vice-Admiralty patents which were confined to waters within the flow and reflow of the tide, continues: "It is easy to understand how such a limitation came originally to be established, but since the discovery of America, and the acquisition by this country of its possessions on that Continent, there is sound reason for departing from it. It is natural to inquire how the question has been viewed by the United States, and it appears that for a great many years a similar limitation was

diction of the Admiralty Court should be extended to any claim for damage by any ship, according to the English statute; but we are not inclined to disturb the rule that has been settled for so many years because of some supposed convenience."

[1] The whole of the correspondence hereinafter referred to will be found in Canada Sessional Papers, 1877, Nos. 13 and 54 in vols. 7 and 8.

[2] Vice-Admiralty judge at Quebec.

recognised in their Courts; but in a case[1] arising out of a collision between two ships on Lake Ontario the point was specially raised, and was decided in a contrary sense, in disregard of previous decisions and from a consideration of the necessities of the case. Still, however, looking to the fact that the jurisdiction of the Admiralty Court has not hitherto been exercised or asserted in any but tidal waters, it may be a matter for consideration whether it should now be claimed as of right, or whether statutable power to exercise it is requisite or desirable; and on this point their lordships might wish to have the opinions of the law officers or at least of the Admiralty advocate."[2]

On consideration of the papers, the Committee of Council in Canada resolved (February 28, 1876) that the matter should stand over for personal conference. During the same year the opportunity occurred when Mr. Blake, Minister of Justice, visited this country. He was requested by Lord Carnarvon to discuss the question in conference with Mr. Rothery; and on July 1, 1876, he reported to Lord Carnarvon that Mr. Rothery "concurs in the propriety of the establishment by local legislation[3] of such Courts as may be found advisable to meet the wants of trade on the Great Lakes and inland waters."

The outcome of Mr. Blake's negotiations was the Canadian Act of 1877 (No. 21) establishing the Maritime Court of Ontario. S. 1 was as follows:

> Save as by this Act excepted,[4] all persons shall after this Act comes into force have in the Province of Ontario the like rights and remedies in all matters (including cases of contract and tort and proceedings *in rem* and *in personam*) arising out of or connected with navigation, shipping, trade, or commerce on any river, lake, canal, or inland water, of which the whole or part is in the Province of Ontario, as such persons would have in any existing British Vice-Admiralty Court, if the process of such Court extended to the said province.

S. 2 constituted the Maritime Court, and declared that it should have, "as to the matters aforesaid, all such jurisdiction as belongs in similar matters, within reach of its process, to any existing British Vice-Admiralty Court."

On the passing of the Colonial Courts of Admiralty Act, 1890 (53 & 54 Vict. c. 27), the Canadian Parliament passed the Admiralty Act, 1891 (54 & 55 Vict. No. 29). S. 3 provides that "in pursuance of the powers given by the Colonial Courts of Admiralty Act, 1890, aforesaid, or otherwise in any manner vested in the Parliament of Canada," the Exchequer Court of Canada shall be a Colonial Court of Admiralty, and as such "shall within

[1] *Genesee Chief* v. *Fitzhugh*, 12 Howard.

[2] These opinions do not seem to have been sought; at any rate, there is no reference to them in the subsequent correspondence.

[3] Mr. Rothery had previously advised Imperial legislation.

[4] S. 3 excepts prize, piracy, revenue, navy, etc.

Canada have and exercise all the jurisdiction, powers, and authority conferred by the said Act and this Act." S. 4 runs as follows :

> Such jurisdiction, powers, and authority shall be exercisable and exercised by the Exchequer Court throughout Canada and the waters thereof, whether tidal or non-tidal, or naturally navigable or artificially made so, and all persons shall as well in such parts of Canada as have heretofore been beyond the reach of the process of any Vice-Admiralty Court, as elsewhere therein, have all rights and remedies in all matters (including cases of contract and tort and proceedings *in rem* and *in personam*) arising out of or connected with navigation, shipping, trade, or commerce, which may be had or enforced in any Court of Admiralty under the Colonial Courts of Admiralty Act, 1890.

The Act further constitutes "local judges in admiralty" and "admiralty districts," abolishes the Maritime Court of Ontario, and concludes with a reservation of the Act for the signification of Her Majesty's pleasure.

It is to be noted that in neither Act is there reference to any proprietary character of the inland waters or to the treaty boundaries. The main considerations in the draftsman's mind are the subject-matter of suits, the navigability of waters, and the length of the Court's arm. It is further noteworthy that the Act of 1891 recites not only the powers of the Imperial Act, but also those "otherwise in any manner vested in the Parliament of Canada."

In 1869, eight years before the passing of the Act of 1877, it was decided in the Canadian Courts that the water, and even the American water, of the Great Lakes was within the criminal admiralty jurisdiction. The head-note of *Reg.* v. *Sharp* (5 P.C. 135) is as follows: "The great inland lakes of Canada are within the admiralty jurisdiction, and offences committed on them are as though committed on the high seas, and therefore any magistrate of this province has authority to inquire into offences committed on the said lakes, although in American waters." The offence was scuttling a ship on Lake Erie.

It is only necessary to add—and the observation is of interest—that the admiralty jurisdiction of the United States and Canada respectively in respect of matters arising on the Great Lakes has grown and become established, not only without the assistance of any agreement or convention between Great Britain and the United States, but without the passing of so much as a despatch between Downing Street and Washington, so far as can be ascertained.

AUSTRIAN DIVORCE LAW.

[*Contributed by* PROFESSOR E. TILSCH, *of Prague.*]

THE Austrian law of marriage is founded on the General Civil Code of 1811, which in the present year celebrates its centenary. A few posterior statutes to be mentioned in the course of this sketch [1] have not altered its confessional or ecclesiastical basis. The Catholic marriage being declared indissoluble, the Catholics are limited to the separation *a thoro et mensa*, unless it should happen that they can allege the initial invalidity of their marriage for a legal impediment. The separation and the declaration of invalidity can be obtained also by non-Catholics, but the practical importance of these two institutions chiefly affects Catholic marriages.

As to all three cases, the Code prescribes judicial intervention by s. 93, which is worded as follows: "The spouses are on no account allowed to dissolve arbitrarily the marriage union even although they may have agreed on the subject; they may maintain the invalidity of the marriage, or its dissolution, or wish to come only to a separation *a mensa* and *thoro*." [2]

We proceed to mention the causes for which divorce, separation, and declaration of invalidity are granted, and then treat some questions of adjective law interesting from an international point of view.

I. DIVORCE A VINCULO MATRIMONII.

It is necessary to distinguish three kinds of marriages:

A. **Catholic Marriages.**—When both or when even only one of the parties professed the Catholic religion at the time the marriage was concluded, the tie of marriage can only be dissolved by death (s. 111). The change of religion during the marriage is immaterial: the marriage remains indissoluble.

B. **Non-Catholic Christian Marriages.**—When both of the parties professed a non-Catholic Christian religion at the time the marriage was concluded, divorce is permitted (s. 115) either by mutual consent, if an insuperable disinclination is proved before the tribunal, or on complaint of one of the spouses, but only for one of the following reasons: (1) When one of the parties has been guilty of adultery or a crime which has resulted

[1] For which the Report of the author for the Committee on Divorce Law of the International Law Association has been utilised.

[2] The English translation of Winiwarter (General Civil Code, First Part, Vienna, 1865) has been followed.

in a sentence of at least five years' imprisonment; (2) when one of the parties has wickedly deserted the other, and in case his or her place of residence is unknown, he or she has not appeared in consequence of a public judicial summons within a year; (3) attempts dangerous to life or health; (4) repeated severe ill-treatment.

When during the marriage one of the parties has joined the Catholic religion, he or she is unable to apply for the dissolution, but the non-Catholic party remains capable of applying (s. 116).

The purview of the rules for non-Catholic Christian marriages has been considerably enlarged by the Statute of April 9, 1870, No. 51, s. 2, according to which all persons who do not belong to any religious denomination acknowledged by law are, as regards divorce, deemed equivalent to non-Catholic Christians. Consequently these rules are to be considered now as the general rules for divorce, applicable to all cases, except if at least one of the parties was Catholic at the time the marriage was concluded (see *sub* A), or if at that time both of them were Jews (see *sub* C).

C. **Jewish Marriages.**—When both of the parties professed the Mosaic religion at the time the marriage was concluded, divorce is permitted (ss. 133-137) either by mutual consent of the parties before the tribunal (an insuperable disinclination is not required) or by complaint of the husband when the wife has committed adultery (the wife has no such right).

These rules remain valid when at the time the marriage is to be dissolved at least one of the parties remains a Jew; but when at this time none of the parties professes the Mosaic religion, the general rules mentioned *sub* B are applied (Decree, August 8, 1853, No. 160; Statute, April 9, 1870, No. 51, s. 2).

II. Separation a Thoro et Mensa.

Judicial separation is granted either by mutual consent before the tribunal (ss. 103, 132) or by complaint of one of the parties for an important reason. Such reasons are enumerated in s. 109, Civil Code, by way of example: When the defendant has been declared guilty of adultery or a crime; when the defendant has wickedly deserted the complaining spouse; when the defendant has led an irregular life, by which a considerable part of the property of the complaining spouse or the good morals of the family have been placed in danger; attempts dangerous to life or health; severe ill-treatment; very marked and repeated *injuria* according to the circumstances of the persons; permanent defects accompanied with danger of infection.

III. Invalidity of Marriage.

The invalidity of a marriage can be inquired into *ex officio*, if there is an *impedimentum juris publici*. When there is only an *impedimentum juris privati* a marriage can be declared invalid only on application of the

injured and innocent party who was ignorant of the impediment; the husband or the wife loses, however, this right, if he or she continued in the marriage state after having acquired a knowledge of the impediment (ss. 94-96).

The dispensation from marriage impediments belongs to the administrative authorities (s. 83).

A. **Impedimenta juris publici** are as follows:

1. *Abduction.*—The consent is invalid when it has been given by a person abducted and not set at liberty (s. 56).

2. *Existing Marriage.*—One man can only be married to one woman at the same time, and one woman only to one man (s. 62).

3. *Consecrations and Vows.*—Ecclesiastics who have received higher consecrations, as well as members of religious orders of both sexes who have taken solemn vows of celibacy, cannot conclude valid marriages (s. 63).

4. *Difference of Religion.*—Marriage between Christians and persons who do not profess the Christian religion cannot be validly concluded.

5. *Relationship.*—No valid marriage can be concluded between relations in the ascending and descending line, between brothers and sisters, between cousins, or with the brothers and sisters of the parents (s. 65). Among Jews the impediment of relationship does not extend to persons related by a collateral line further than the marriage between brother and sister, then between the sister and a son or grandchild of her brother or sister (s. 125).

6. *Affinity.*—Affinity is an impediment—namely, the husband cannot marry the relations of his wife mentioned (*supra* in 5), and the wife the relations of her husband mentioned there (ss. 66, 125).

7. *Adultery.*—A marriage contracted between two persons who have committed adultery with one another is invalid; the adultery must, however, be proved before the conclusion of the marriage (s. 67).

8. *Attempt to Murder.*—A valid marriage cannot be concluded between two persons who, even without having committed adultery, have promised to marry one another, and when, in order to attain their object, either of them has attempted the life of the spouse who was a hindrance to the marriage, even supposing the murder was not really perpetrated (s. 68).

9. *Defects in Form.*—The solemn declaration of consent must take place before the proper spiritual guardian of one of the persons intending to marry, or before his representative, in the presence of two witnesses (s. 75). In the case of solemnisation of the marriage before a civil authority, the presence of the chief of the competent administrative district authority or of his representative, of a sworn recording clerk and of two witnesses is required (Statute, May 25, 1868, No. 47, Art. II. s. 7). Where both of the parties belong to religious bodies acknowledged by law, the solemnisation before the civil authority is valid only when the proper spiritual guardian of one

of the parties has refused to solemnise the marriage for a reason which is not recognised by the civil law.

10. *Inducement to Dissolution.*—A valid marriage cannot be concluded with those who, according to the proofs alleged on the occasion of the dissolution, have caused the dissolution, which took place, by adultery, by incitement, or in another punishable manner (s. 119).

11. *The so-called Impediment of Catholicism.*—A Catholic cannot conclude a valid marriage with a person whose marriage has been dissolved when the former husband or wife of the latter is still living (Aulic Decree, August 26, 1817, No. 1099); and a Catholic whose marriage has been dissolved cannot conclude a valid marriage with anybody if the former husband or wife of the Catholic is still living (Aulic Decree, July 17, 1835, No. 61). The second case is, according to what has been said *sub* I. A, B, possible only when the Catholic was non-Catholic at the time when the dissolved marriage was concluded.

B. **Impedimenta juris privati** are as follows:

1. *Want of Legal Capacity.*—Delirious persons, madmen, idiots, and persons under the age of fourteen years are not able to conclude a valid marriage (s. 48). Minors who are under the paternal authority need the consent of their father; other minors and persons who for whatever reason are not able alone to conclude a valid obligation require, besides the declaration of their guardian or curator, the consent of the tribunal (ss. 49-53). A marriage contracted without authorisation can also be disputed by the father, guardian, or curator, but only as long as the paternal power, guardianship, or jurisdiction of committee lasts (s. 96).

2. *Want of Corporeal Capacity.*—Permanent impotency is an impediment if it existed at the time the marriage was concluded (s. 60).

3. *Fear.*—The consent to the marriage is invalid if it has been extorted by well-founded fear (s. 55).

4. *Error.*—(*a*) Error makes the consent to a marriage invalid when it has occurred as to the person of the future spouse (s. 57). (*b*) If a husband finds after the marriage that his wife was already pregnant by another man, he is entitled to demand that the marriage be declared invalid (s. 58).

5. *Criminal Sentence.*—A military criminal who is sentenced to death or to serve imprisonment cannot contract a valid marriage (ss. 45-47, Military Criminal Code).

6. *Want of Banns.*—To constitute a valid marriage the banns must be published once at least (s. 74).

IV. Competent Tribunals.

It is necessary to distinguish contentious and non-contentious matrimonial causes. The non-Catholic Christian divorce, either by mutual consent or on complaint of one party, the Jewish divorce on complaint of the husband,

the separation on complaint of one of the parties, and all suits based on invalidity, are as to the proceeding considered contentious matter (Aulic Decree, August 23, 1819, No. 1595), and belong to the Courts of First Instance (s. 50, Statute of Jurisdiction). Jewish divorces by mutual consent, and separation by mutual consent, are non-contentious, and belong to the (lower) District Tribunals (s. 117, Statute of Jurisdiction).

The Legislative Bodies and the Sovereign take no action in matrimonial causes.

In the case of *aliens* all matrimonial causes are judged by Austrian Courts only when the spouses have or had their *last common* domicile in Austria (s. 76, Statute of Jurisdiction); residence is not sufficient. Whether one of the spouses or both *separately* are, at the time when the suit is commenced, domiciled or resident elsewhere seems to be immaterial; but this latter statement may be open to controversy, as some authors and decisions require that at least one of the spouses is still domiciled in Austria.

In the case of *Austrian citizens* domiciled out of Austria, the same provisions of s. 76, Statute of Jurisdiction, apply, *i.e.* the Austrian Courts are competent when the spouses had their last common domicile in Austria; but a plaint against an Austrian citizen for separation, divorce, or invalidity of a marriage can be presented if there is no Austrian Court competent, according to the last common domicile, at the Court where the plaintiff has his domicile, and if the plaintiff has no domicile in Austria at the Court of First Instance in Vienna (s. 100, Statute of Jurisdiction).

In no case, either of nationals or of aliens, is a fixed length of residence or domicile required. Moreover, in the case of Austrian citizens no domicile or residence is required at all, as appears from what is stated above; while in the case of aliens it is necessary that they have, or at least have had, their last common domicile in Austria.

Whether the marriage was solemnised in or out of Austria, or whether the alleged matrimonial offence or impediment arose within or outside Austria, is immaterial.

V. Procedure and Decision.

A. **Service of the Writ.**—The suit is generally commenced by a plaintiff's plaint (when the parties agree by application of both of the parties, where there is an *impedimentum juris publici* by the Court *ex officio*). The plaint contains the facts on which the plaintiff bases his claim, the means of proving them, and the prayer for relief, *i.e.* the proposal of what shall be decided by the Court. The plaint is written in two copies and addressed by the plaintiff directly to the competent Court (not to the defendant). The Court, if it is competent according to the alleged matter, and if the plaint is formally correct, retains one copy for its own

use and serves the other on the defendant with the summons ; the plaintiff is summoned at the same time. All other services are also effected *ex officio* by the Court, the parties being in communication only by the medium of the Court. There are no particular officers for serving writs in Austria.

The methods adopted for service are precisely the same as in other (non-matrimonial) law-suits.

When the service is to be made within Austria, it is generally made by post (s. 88, Civil Procedure), *i.e.* the Court sends the plaint with the summons as an official registered letter (with a receipt, which is to be signed by the addressee with his own hand) to the address of the defendant indicated by the plaintiff in the plaint.

When the service is to be made out of Austria, the service is never made by post, but the Court generally requests the foreign competent authority to effect the service (s. 121, Civil Procedure). This requisition is made, according to different conventions and internal regulations, either directly or by the mediation of the diplomatic or consular authorities. The main convention on this subject is that of The Hague, dated July 17, 1905 (published in Austria, 1909, No. 60), between Austria-Hungary, Germany, Belgium, Denmark, Spain, Russia, Sweden, and Switzerland. As to Great Britain and Ireland, a decree of the Austrian Minister of Justice of December 12, 1900, gives the following information: The British authorities render no aid to the Austrian Courts in respect of service; the Austro-Hungarian diplomatic and consular authorities in Great Britain and Ireland can effect the services directly upon the addressee only when the addressee does not decline the acceptance ; for the rest, service is only obtainable by the direct application of the interested party to the competent British authority. In the United States of America, as results from a decree of the Austrian Minister of Justice of January 31, 1897, the American authorities render aid in this matter on application of the Austro-Hungarian consuls. In non-Christian countries where consular jurisdiction still exists, services are effected by the Austro-Hungarian consular authorities directly upon Austrian citizens.

There is no difference in the binding effect of judgments or decrees rendered after service of the plaint upon the defendant within or outside Austria.

Appearance by the defendant in the action personally or by his counsel or solicitor is not by itself equivalent to personal service ; but if the party who has appeared, or his duly appointed advocate or other mandatory (in matrimonial suits the intervention of an advocate is not necessary in the first instance), participates in the proceeding without objecting to the want of due service, this defect must be deemed remedied (s. 196, Civil Procedure).

At the instance of the plaintiff, service on the defendant can be made

by service upon a curator, to be appointed by the Court for the defendant in connection with public judicial summons, in the following three cases: (*a*) When the acknowledgment of the receipt is not returned from the requested authority in a suitable time; (*b*) when service in the foreign country has been in vain attempted; (*c*) when the requisition does not promise success owing to the evident refusal of aid by the foreign authority (s. 121, Civil Procedure).

B. **Guarantees of the Public Interest.**—In all matrimonial causes (with one exception, mentioned below) the inquisitorial principle (inquiry of relevant facts by the judge *ex officio*) is applied, even in those which have been initiated by a private plaint (Aulic Decree, August 23, 1810, No. 1595). In suits for nullity or divorce the confessions of the two spouses have not the force of proof as to the alleged impediment or offence, nor can proof by interrogation of the parties be admitted (s. 99, Civil Code). In suits for nullity or divorce a *defensor matrimonii* is always appointed by the Court (ss. 97, 113, Civil Code). He is usually an advocate; his duty is to intervene in the proceeding, to gather information as to the alleged impediment or offence, to ascertain any doubts and objections against the nullity or dissolution, and to inform the Court conscientiously (s. 17, Aulic Decree, August 23, 1819, No. 1595). When the judgment of the Court of First Instance is in favour of nullity or dissolution, the duty of the *defensor* is to lodge an appeal against the judgment, and when one of the parties is a Catholic and the marriage has been declared invalid he is bound to propose a revision by the Supreme Court (s. 18, Aulic Decree, 1819).

However, there is an exception to these regulations. Cases of divorce according to the special law for Jews (see I. c.) initiated by plaint of the husband, when the wife has committed adultery, are treated in all respects like ordinary non-matrimonial suits (s. 135, Civil Code), *i.e.* there is no inquiry of facts *ex officio*, no limitation of proofs, no *defensor matrimonii*. The reason is because the Jewish marriage is dissoluble in any case when the spouses agree.

C. **Decision.**—In contentious cases the decision is a final judgment, in non-contentious cases a final decree. Decrees nisi are unknown to the Austrian law; the public interest being sufficiently guaranteed by what has been said *sub* B.

However, there are two prescriptions (rarely used in practice) which have some similarity to the decree nisi in delaying the final decree: (*a*) In the case of alleged impotency, if it is not possible to determine with certainty whether the impotency is lasting or only temporary, the spouses will be compelled to live together for a year, and should the impotency have continued during this time, the marriage is to be declared invalid (s. 101). (*b*) In the case of dissolution of a non-Catholic Christian marriage by mutual consent, on the ground of insurmountable disinclination, the dissolution

of the marriage is not granted immediately; but first of all a separation *a thoro et mensa* is to be tried, and according to circumstances, even on repeated occasions (s. 115).

VI. Foreign Judgments.

Foreign judgments which concern the personal status of an *Austrian* citizen have no force against such citizen (s. 81, No. 3, Code of Execution). This rule applies to all matrimonial causes here dealt with.

Foreign judgments which are to be enforced against *non-Austrians* indifferently, whether citizens of the country of the foreign Court or not, are in general (if there are no special conventions or internal regulations) enforceable only under the following cumulative conditions:

1. When reciprocity is guaranteed (s. 79, Code of Execution).

2. When according to the Austrian law the cause could have been entered in such foreign country (s. 80, No. 1), *e.g.* when the spouses had in such country their last common domicile (see IV.).

3. When the summons or other act by which the proceeding commenced was served upon the defendant personally, and either in the country of the Court, or in Austria, or in another country; but in the two latter cases only when it was served after requisition of the competent authority of the country of the forum, and by the competent authority of the country where the service was effected—consequently not, *e.g.* by a counsel of the country of the forum (s. 80, No. 2).

4. When the judgment according to the attestation of the competent foreign authority is according to the foreign law not liable to appeal for another remedy suspending its execution (s. 80, No. 3).

5. When by no irregularity in the proceedings was the defendant denied the possibility of participating in it (s. 81, No. 1).

6. When no act or thing is to be enforced which according to the Austrian law is on the whole not allowed, or at least not enforceable (s. 81, No. 2).

7. When no legal situation is to arise or be acknowledged, or any claim be realised, of which Austrian law denies the validity or actionability on grounds of public order or public morality (s. 81, No. 4).

It must be remarked that, although Austria-Hungary has adhered to the conventions of The Hague of June 12, 1902, concerning the conclusion, divorce, and separation of marriage, these conventions have not yet been promulgated in Austria, and therefore have no judicial effect.

THE GREAT JURISTS OF THE WORLD.

XIII.—ALBERICUS GENTILIS.[1]

[*Contributed by* COLEMAN PHILLIPSON, ESQ., LL.D., LITT.D.]

IT has too long been the custom to consider Grotius as the father of modern international law,[2] as a resplendent luminary in a seemingly dark age, and accompanied, at a distance, by certain minor satellites barely worthy of mention. The influence of Grotius has undoubtedly been great; but it is usually forgotten that the way was prepared for him by others, and notably by Gentilis. The achievement of the Dutch jurist could not possibly have been what it was in the absence of the forcible, reasoned, and—comparatively speaking—pioneer work of the Italian lawyer. A study of the work of Gentilis—and to appreciate it duly, it must ever be borne in mind that he was Grotius' predecessor—will show what a high place he takes in the history of modern international law, and particularly in regard to its development on the positive side; and it will be seen that because of the greater affinity between his point of view and that of modern States he is, in that respect, more truly than is Grotius, the progenitor of the existing law of nations.

Life.—Albericus Gentilis (Alberico or Alberigo Gentili) was born on January 14, 1552, at San Ginesio, a small town in the mark of Ancona. It is commonly held that he was the eldest of seven, though some reports state that he was the second son. His father, Matthæus (Matteo), was a physician. After receiving a thorough home education, Albericus was sent to the University of Perugia, then one of the most famous in Italy, and particularly noteworthy as a school of law, where distinguished men like Baldus and Bartolus had been professors. Soon after reaching his twentieth year he graduated as Doctor of Civil Law. For some time afterwards he held the

[1] The available bibliographical materials are given by Prof. Holland in his article on Gentilis in the recent edition of the *Encyclopædia Britannica*; and by H. Nézard in *Les Fondateurs du droit international* (Paris, 1904).

[2] In the recently published work, *The International Law and Custom of Ancient Greece and Rome*, 2 vols. (Macmillan & Co.), the present writer has shown that modern international law is by no means a creation, but partly a restoration, partly a continuation of ancient institutions and customs. Indeed Gentilis and Grotius and all the early writers on the law of nations constantly appeal to the classical times for authority, for rules, for practices, for analogies, for all kinds of illustrations.

office of "proctor" or judge at Ascoli; then took up the work of advocacy in his native town, and was often consulted in matters relating to its municipal statutes and institutions.

His father having embraced Protestantism, he was obliged, through the oppressive exertions of the Inquisition, to leave home, and, together with Albericus, he proceeded to Laybach in Carniola. There they were soon joined by the youngest son, whom Albericus took to Tübingen. The latter then went to Heidelberg, and some months after came to England (August 1580). Here he was welcomed by a group of Italian Protestant refugees, amongst whom were men like Contio, a theological writer, Borgarucci, physician to the Earl of Leicester, and Castiglione, Italian tutor to Elizabeth. Through this circle Albericus soon became acquainted with Sir Philip Sidney, Leicester, then Chancellor of Oxford University, Robert Dudley, Vice-Chancellor, and Tobie Mathew. In January 1581, he was admitted, through the Earl's letters of commendation, into the University as Doctor of Civil Law, and a little later was appointed reader. He was delighted with his work, and expressed great admiration and enthusiasm for Oxford—for its studious colleges as well as for its beautiful situation.[1] In the meantime his fame as a civilian spread rapidly through his lectures, disputations, and writings.

In 1584 the English government consulted Gentilis, together with Jean Hotoman (who had been received into the university at the same time as the former), on the Mendoza affair; and in spite of deep feeling aroused by the treacherous conduct of the Spanish ambassador, the opinion of Gentilis was followed.[2] The next year he developed the doctrine of the rights and duties of ambassadors, first in a University *disputatio*, then in a published work, *De legationibus*, dedicated to Sir P. Sidney.[3] In 1586, by the influence of Walsingham, Albericus accompanied Horatio Pallavicino, who was despatched on an embassy to the Elector of Saxony; and on his return to Oxford the next year he was appointed to the Regius Professorship of Civil Law.

Various publications were issued by him on a large number of questions of the day; besides treatises on civil law and on ancient war practices, there were the more famous *Prima commentatio de jure belli*, published in London, 1588, the second and third parts 1589. The three books were issued together in 1598 at Hanau as a practically new work, *De iure belli libri tres*. Notwithstanding his academic and literary activities, he became a member of

[1] Cf. the preface to his *Dialogi Sex*, which was dedicated to Leicester: "Qui Oxoniam norint et ii norint necesse est ut mecum agatur qui Oxoniæ vivo, in ea scilicet civitate quæ, situs amœnitate felicissima magnificentissimis studiosorum collegiis, proculdubio augustissima in toto orbe."

[2] See *infra*, on Ambassadors.

[3] Wheaton, *Hist. of the Law of Nations*, pp. 232-3 (following Ward), states that the famous consultation took place the year after the publication of the *De legationibus*. This is not correct. Besides, Wheaton appears to have misunderstood the purport of Gentilis' opinion on the question.

Gray's Inn, August 1600, and found time for forensic engagements. In 1605 he was appointed, with King James's permission, advocate to the Spanish embassy; and in that capacity appeared on behalf of the King of Spain before the English Court of Admiralty which tried certain prize cases that had arisen in the war between Spain and the Netherlands. (The notes of the cases in which he took part were published after his death under the title of *Advocationis Hispanicæ libri duo*, Hanoviæ, 1613.) Gentilis died in London on June 19, 1608, and was buried in St. Helen's Church, Bishopsgate.

The importance of his writings and the great services he rendered to international law have only recently been fully realised. For a long time writers had looked to Grotius as the founder of the modern law of nations, and had neglected to take account of his forerunners. But the great work of Gentilis was bound to be sooner or later recognised. It may be said that his resuscitation was due to men like Emerico Amari, W. A. Reiger of Groningen, Mancini, and most of all to Prof. Holland. In November 1874, Prof. Holland delivered an inaugural lecture on the life and writings of Albericus Gentilis, whose contribution to international law was pointed out and whose claims were duly emphasised. A published copy of this lecture came to the notice of Prof. Mancini of Rome; and in March 1875, an influential Italian committee was formed under the chairmanship of Mancini and the honorary presidency of Prince Humbert. In the following September it issued a manifesto, which spoke of Gentilis as "the prophet of God, the inspired apostle of peace," as an illustrious advocate of liberty of conscience, as an initiator of a new epoch. Festivities were in many quarters held in his honour. But the movement was not without opposition. On the one hand, in Italy the ultra-Catholic press condemned the "impious" project to do honour to an "apostate" and an "enemy of the Church." On the other hand, in Holland the worshippers of Grotius manifested overmuch anxiety as to the threatened supremacy of their countryman, and even accused Prof. Asser of treachery to his country for identifying himself with the Italian movement—the outcome of which was the unveiling in 1886 of a statue of Grotius at Delft. It was not till 1908, the tercentenary of the death of Albericus, that the Italian authorities succeeded in erecting a monument to him in his native town. In England, a committee under the honorary presidency of Prince Leopold set up, in 1877, a memorial to the Italian jurist in St. Helen's Church, and—what was of more practical importance—caused a new edition of his greatest work, the *De iure belli*, to be published under the editorship of Prof. Holland.

Works.—The works of Gentilis show a very wide range of subjects; and, apart from a quantity of existing MSS. and some writings no longer extant, they comprise some thirty publications.[1] His attention was constantly

[1] For a detailed list of his writings see *Alberico Gentili*, by Prof. Holland—a reprint of the inaugural lecture of 1875—in *Studies in International Law* (Oxford, 1898); and the same writer's article in the *Encyclop. Brit.*, as already mentioned.

occupied with the various legal, political, and moral controversies of the time, including questions relative to the law of nations, the union of England and Scotland, the limits of sovereign power, the application of certain old rules of civil and canon law and the conflicts thereof, the problem of remarriage, the legal and moral position of stage plays, the justifiableness of lying, etc. Of all his works those of most lasting importance are the three dealing with matters of international law, namely, first and foremost *De iure belli*, secondly *De legationibus*, and *Advocatio Hispanica*. These three works deal more or less systematically with the principal portions of the entire subject, and, on the one hand, contain vigorous arguments on new and doubtful questions, on the other, emphasise previously established rules which from time to time had been broken. Gentilis is far from attempting the detailed elaboration of a complete code; but in each of his contributions to the subject he has made his mark.[1]

The *De iure belli* probably owes its origin to a series of inaugural "disputationes," though the work betrays few signs of the usual character of academic disputations. The subject of the law of war is at once liberated from the archaic point of view which confounded it with the regulations of military discipline, and is definitively placed on firm foundations, supported by legal as well as moral sanctions. It is divided into three parts. Book I. deals with war in general—who may make it, and what motives or causes justify it. Book II. lays down the lawful mode of conducting belligerent operations—declaration, acts permitted and forbidden after open hostilities have commenced, use of spies, poison, and stratagems, treatment of the person of the enemy (non-combatants, prisoners, hostages), and of the different kinds of enemy property, pacts and truces of the commanders. Book III. discusses the conclusion of war, rights of occupation, and of the victor as to the persons and property of the conquered, establishment of peace. Thus the question which the *De iure belli* undertakes to answer is: Under what circumstances is war justly undertaken, conducted, and terminated?

The *De legationibus* presents perhaps less a development of principles of the law relating to ambassadors than a historical account of legations. It is similarly divided into three books—the first dealing with the historical origin of different kinds of embassies, the ceremonies and solemnities of the Roman fetial envoys, the place, time, and mode of reception of foreign ambassadors coming to Rome and the *munera* bestowed upon them; the second book with the privileges and immunities of accredited envoys generally; and the third with the qualifications which an ambassador ought to possess.

The *Advocatio Hispanica* is, as has already been pointed out, a collection of interesting notes on cases in which the author was engaged as counsel for Spain against the Netherlands. In the war between these two countries the

[1] The editions referred to in the present essay are *De iure belli* (ed. Holland); *De legationibus* (Londini, 1585); *Advocatio Hispanica* (Hanoviæ, 1613).

latter had claimed the right to capture Spanish prizes in English waters. Besides the appeal to historic precedents and the application of rules of Roman jurisprudence, there is a precise and vigorous statement of the doctrine of territorial sovereignty (including exclusive jurisdiction in adjacent seas) as the fundamental principle underlying the mutual rights and obligations of belligerents and neutrals. In reference to this great question Gentilis makes a decided advance, and we find that his conclusions forestall, for the most part, those of modern international law.

These works are, on the whole, written in a style characterised by energy, directness, and clearness; though at times, indeed, passages are found which betray a certain scholastic pedantry, with the usually accompanying faults of prolixity and ambiguity. Gentilis does not, it is true, write Latin with the facility and classical grace of an Erasmus, or some of the other practised Ciceronians of the time; but in comparison with most of his contemporaries, especially those who wrote juristic or theological treatises, he is at advantage through his ease, vivacity, variety, conversational tone, freedom from elaborate rhetorical flourishes. Moreover, by virtue of his shrewd humour and his concentration on the particular matter before him, his style is invariably saved from dryness and tedious irrelevancies.

Position and Method.—What position does Gentilis occupy in the history of international law, what is his point of view, and what is his method of dealing with the subject? Gentilis is the first great writer of *modern* international law, the first clearly to define its subject-matter, and to treat it in the way which is fundamentally in harmony with the conception and practice of our own time.[1] For this reason it may justifiably be claimed that—as the precursor of Grotius, and as the one who substantially prepared the way for him and greatly influenced his and all succeeding work—Gentilis is the real "father" of the modern law of nations (that is, if it is at all proper to confer such a title on any particular jurist).[2] Amongst the pre-Grotians he is the illustrious representative of the historical school; his insistence on the positive aspect of international law is almost as emphatic as in the work of Bynkershoek.[3] On Zouche,[4] the earliest English exponent of the same general view, the Italian writer's influence was unmistakable. Notwithstanding various shortcomings—indeed, inevitable at the time he wrote—the entire work of

[1] Cf. D. H. L. von Ompteda, *Litteratur des gesammten sowohl natürlichen als positiven Völkerrechts* (Regensburg, 1785), § 49, p. 168: "Dieser ist der erste Gelehrte, der sich einige wahre Verdienste um die Völkerrechtswissenschaft erworben hat . . . der solche als einen Gegenstand des Völkerrechts abhandelte."

[2] Cf. Lampredi, *Del commercio dei popoli neutrali*, in the pref.; C. von Kaltenborn, *Die Vorläufer des Hugo Grotius* (Leipzig, 1848), p. 228: "Er ist der erste wichtigere Autor des modernen Völkerrechts und in dieser Beziehung als der eigentliche und unmittelbare Vorläufer des Grotius zu betrachten. Ja ich halte ihn für die unmittelbare Grundlage des Grotius."

[3] See the present writer's article on Bynkershoek in the *Journal of Comparative Legislation*, New Series, No. XIX. Aug. 1908, pp. 27 *seq.*

[4] See the present writer's article on Zouche, *ibid.* No. XX. April 1909, pp. 281 *seq.*

Gentilis is manifestly superior to all previous productions, such as, for example, those of Ayala, Victoria, Soto, Belli, or Suarez, who either confused civil law with rules regulating international relations or failed to grasp the difference between philosophical or theological principles and juridical rules, or, again, confounded the rules of interstatal war with the municipal prescriptions of military discipline,[1] or identified the "societas gentium" with an exclusive Christian commonwealth. The theological basis of the whole subject, which was generally affirmed or assumed by his predecessors, was once and for all undermined. The dogmatic procedure of the theologians was unreservedly impugned; they were roundly advised not to meddle with matters which did not concern them, "silete theologi in munere alieno."[2] Similarly, the *a priori* methods of the philosophers were rejected. The abstract principles and metaphysical assumptions associated with the investigations into the intrinsic nature of God, mankind, and the State he disregarded as necessarily leading to the establishment of an ideal system which could not meet the demands nor guide the growth of an actual society of nations which possesses an essentially organic and dynamic character. What Bacon insisted on as the true method of science, Gentilis had already maintained to be the method of international law: the examination of actual phenomena, of concrete facts, and then by a process of induction the inferring therefrom of general rules, which, however, are still subject to subsequent modification or even cancellation, in accordance with newly discovered facts.

The apprehension of the various issues arising out of this conception was facilitated by his restricting the field of juristic inquiry, and eliminating such matters as were not clearly germane thereto. In contradistinction to the "Humanists," the "Alciatists," a school founded by Alciatus, and including men like Cujas and Hotoman, Albericus associated himself to the old school of civilians, the "Bartolists," who confined themselves more to the subject-matter of jurisprudence proper, and devoted themselves but little to the assimilation of classical culture and wide literary learning. To the rebuke of Cujas that the Bartolists, through neglecting the "humanities," were foolish and shameless babblers and a sordid crew—"blaterones, insipientes, improbi, avari"—Gentilis retorted that the pretentious Alciatists hardly deserved the name of jurists at all, and that jurists might manage well enough without giving themselves to Greek and Latin letters.[3] Nevertheless, Albericus, though not possessing the great erudition of Grotius, had wide learning, and, in order to support or illustrate his facts and conclusions, he

[1] Cf. the early but influential example of Isidore of Seville (beginning of seventh century), who, after enumerating the various subjects comprised in *ius gentium*, admits a further division, *ius militare*, including a large variety of heterogeneous matters, such as the mode of commencing hostilities, breaches of military discipline, desertion, military dignities and awards, sharing of booty, etc. (*Originum sive Etymologiarum lib. v.*, especially Bk. V. cc. 4-7). We see here considerable borrowings from Ulpian.

[2] *De iure belli*, I. 12.

[3] *Dialogi Sex* (1582). Cf. T. E. Holland, *Studies in International Law*.

quotes or refers to a great number of writers, classical and modern, including contemporary authorities; *e.g.* Herodotus, Thucydides, Aristotle, Polybius, Livy, Plutarch, Cicero, Dio Cassius, Diodorus Siculus, Dionysius of Halicarnassus, Philo, the Bible, the Digest, Corpus iuris Canonici, Tertullian, St. Augustine, Zonaras, Baldus, Alciatus, Bodin, Hotoman, Polydore Vergil, Machiavelli, Guicciardini, Covarruvias, Belli, and others.

Whilst Gentilis belonged to the Bartolists, so far as municipal jurisprudence was concerned, he adopted an independent and what was then a revolutionary attitude with regard to the law of nations. We may well believe him when he states that he has read nothing good on the law of war[1]; though we must admit that he was to some extent indebted to writers like Franciscus a Victoria (1480–1546),[2] and to Pierino Belli (Bello, or Bellinus) (1502—1575).[3] He at once rejected the methods of the civilians, especially those of the school of Bologna, who considered international law as a mere application or extension of the civil law: his disquisition and development of principles in general do not take the form—so common before him—of an elaborate and indiscriminate commentary on the Roman codes. And this careful discrimination on his part is the more remarkable in view of the fact that he was devoted to Roman law and had contributed much to its revival at Oxford, as has been testified by a contemporary English writer.[4] Gentilis adopts the convenient expression "societas gentium," but is at pains to insist that a "societas" of this character is not analogous to a "civitas" under one sovereign authority, and that therefore its rights and obligations cannot be determined by provisions of the civil law. Occasionally he introduces principles and conceptions of Roman law, as in his application of the *lex Julia maiestatis* in discussing the question of the exterritoriality of ambassadors,[5] in his inquiry whether military facts are contracts *stricti iuris* or *bonæ fidei*, in his treatment of the doctrine of prescription. But these considerations of Roman jurisprudence are not advanced in the manner of preceding writers for the purpose of indicating any ultimate legal sanction or furnishing final solutions, but mainly with a view to illustrate his argument. Thus Gentilis broke with the tradition which had lasted for several centuries—from the time of Accursius and Bartolus (who, as Grotius says, might perhaps be excused on account of the "temporum suorum infelicitas")[6] down even to the authorities of his own age, such as Covarruvias and Vasques. Of course, neither Gentilis nor any one else could entirely eliminate the principles of the civil law from a system of international law. There are, on the one hand, fundamental matters

[1] *De iure Belli*, I. 1. [2] *Relectiones theologicæ* (Lyons, 1557), especially V. and VI.

[3] *De re militari et de bello*, written in 1558, published in Venice 1563.

[4] W. Fulbecke, *Direction or Preparation to the Study of the Law* (1599), c. iii., where he remarks that Gentilis "who by his great industrie hath quickened the dead bodie o the civill law written by the auncient civilians."

[5] *De legationibus*, II. 7-8. [6] *Proleg.* 54.

which are of necessity common to the two, and, on the other, various doctrines in the *Digest* which were found "to facilitate the solution of differences arising between States." Thus, James I. in a speech in Parliament, March 20, 1609, expressed his great appreciation of the Roman law which he regarded as, in a sense, a *lex gentium*.

Again, Gentilis is an innovator in that he considers recent and contemporary events, and invokes testimony drawn from the practice of the time, in support of his conclusions. It is true he constantly refers also to ancient authorities, but in doing so he never forgets he is dealing with modern questions; and, therefore, such references are not a mere array of scholastic erudition. His conception of the position and conventional nature of international law is emphasised throughout by his discussion of the events of the time, which—whether in the form of express treaties or customary acts pointing to implied rules—he holds to be of preponderating importance, especially so as law is made for nations and is, therefore, necessarily subject to organic development and adaptation to circumstances. Whereas Grotius deliberately avows that he prefers examples from ancient Greece and Rome on the ground that proceeding from such sources they will have most weight, Gentilis occupies himself largely with the political affairs and problems of the sixteenth century—with the conflicts between Charles V. and Francis I., between Spain and the Netherlands, between England and Spain, between Italy and her oppressors, with the wars of conquest in America, and also with many matters other than warlike, such as the question of papal prerogative, the alliance with non-Christian nations, the conflicting claims of neutral merchants and belligerents, the freedom of the sea. In the treatment of all these controversies, Gentilis, if somewhat chary of detaching himself from the facts and launching forth into wide generalisations, imported vigour, freshness, and common sense, and suggested acceptable solutions in accordance with the criterion of utility and necessity, and with the idea of justice and equity of a prudent impartial man of affairs. And these solutions, in the form of determined principles, were advanced, it must be remembered, at a time when States and sovereigns were too prone to practise bigotry and dissimulation, deceit, and evasion, to resort to excessive rigour and cruelty, to consult considerations marked by caprice or inordinate self-interest.[1]

I. International Law in Time of Peace.[2]

1. **Conception of the Law of Nations; Community of States; Civil Basis.**—The law of nations, designated by Gentilis *ius gentium*,[3] is that

[1] Cf. R. Ward, *An Inquiry into the Foundation, and History of the Law of Nations in Europe*, 2 vols. (London, 1795), vol. ii. p. 612.

[2] For the sake of clearness and convenience, and to obviate repetition, I have considered Gentilis' work as a whole under the classification here adopted, and have avoided separate analyses of his three principal writings.

[3] On the conception of *ius gentium*, see *Int. Law and Custom of Ancient Greece and Rome*, vol. i. pp. 70 *seq.*, 89 *seq.*, and *passim*.

law which all nations, or at least the greater part of them, "maior pars orbis," agree upon. It is the law of the society or community of States.[1] The fundamental notion is thus clearly defined, although he does not use the more precise expression "ius inter gentes," consistently adopted by Zouche,[2] and even foreshadowed by Franciscus a Victoria.[3] Such law regulating the relationships between independent sovereigns or peoples is the result either of express conventions or of tacit compacts inferred from long-established customs generally acquiesced in. The members of the "societas gentium" are interdependent as well as independent; hence, as human beings are in question who have interests and needs in common, mutual relationships are inevitable, association, understanding, and governing laws are necessary.[4] These laws have, on the one hand, a positive basis—the "usus gentium"—and, on the other, are due to the exigence of natural reason.[5] The authority of the *ius naturæ* or *ius naturale* or *ratio naturalis* was invoked by all writers, earlier[6] and later, including Grotius, and even such positivists as Bynkershoek and De Martens. But unlike the sixteenth-century writers, especially the Jesuits, with their revived scholasticism and their *a priori* procedure, Gentilis was not given to the indiscriminate adoration of this "natural" principle, and to the elaboration of a multiplicity of theses largely irrelevant and extraneous to the main subject. In the sixteenth century, indeed, investigations into the *ius naturæ* began to be made by writers like Oldendorp,[7] Hemming,[8] and others, who treated the subject from a wider point of view than the Jesuit or Franciscan theologians had done or were doing. Albericus introduced the principle of natural reason partly to explain the origin of international law, and partly to fortify the positive sanction; and, in so doing, he adopted the Protestant conception as against the Catholic notion—in accordance with the canon law—of a

[1] *De iure belli*, I. 1.

[2] See the article on Zouche, *loc. cit.* p. 284.

[3] Thus in his *Relect. theol.*, V. 1, we find this definition: "Quod naturalis ratio inter omnes gentes constituit vocatur ius gentium."

[4] As to the reason for the establishment by mankind of laws in general, he says: "Ut hæc duo sunt, fragilitatis conscientia et pœnæ timor, ex quibus omnia fere iura humanitatis oriuntur" (*De iure belli*, III. 13; Holland's edition, p. 344).

[5] *De iure belli*, III. 9; p. 316: "... Naturalis ratio, quæ auctor est iuris gentium ..."; p. 319 (referring to the authority of Aristotle): "... rem naturalem esse, quæ semper fieri et ubique solet." Cf. the similar point of view of Suarez, *Tractatus de legibus* (1612), II. 19, 9.

[6] *E.g.* Victoria; Bracton, *De legibus ac consuetudinibus Angliæ* (written in the middle of the thirteenth century), defines *ius gentium* as the law which nations use, and which is derived from natural law. Also in the *Siete Partidas* (finished in 1265 under the direction of Alfonso X. of Castile) frequent reference is made to natural law, which is defined as the law of all animate beings.

[7] J. Oldendorp (d. 1561), *Isagoge seu elementaria introductio iuris naturæ gentium et civilis* (Coloniæ, 1539).

[8] N. Hemming (1513—1600), *De lege naturæ apodictica methodus* ... (Witebergæ, 1562).

universal hierarchy under the papal headship, or, in matters temporal, the idea of an empire under the Emperor as a continuation of the "imperium romanum," in accordance with the views of the civilians.[1] Very frequently we find that Gentilis appeals to the *ius naturæ* in order to test the validity of any doctrine or the legitimacy of any practice, and usually disregards the current vague metaphysico-legal significance of that term, and interprets it in the sense of humanity, justice, the highest common sense of mankind.[2] And throughout his argument he insists on the positive juridical sanction quite as much as on the considerations of ethics or on the behests of divine law, and he is careful to discriminate between the work and objects of theologians and the sphere and functions of jurists.[3]

The pioneer work of Gentilis was in harmony with the larger movement of the sixteenth century, which witnessed a transformation of society, the establishment of a new spirit and wider outlook, the decline of theocracy, the rise of the modern State. The political conceptions of the Middle Ages, which identified civil and ecclesiastical authority, were derived on the one hand from Greek and Roman doctrines, on the other from Hebrew and Christian. Towards the end of the thirteenth century the papal temporal supremacy began to be seriously opposed, especially in France, and its decline was further hastened on by the great schism. The conciliar movement of the fifteenth century spread the theory that sovereign power was of the nature of a trust. The Renaissance and the Reformation revived "humanism," scientific curiosity, established a spirit of independence, political as well as spiritual, and a desire to find a more rational basis for human society than the theocratic, and substituted civil for clerical authority, a society of territorial States resting on a lay and juridical foundation for a theocratic confederation subject to canon law. And at the head of such States are monarchs who, in the view of Gentilis, are in the position of guardians or "administrators" of their respective countries, and not absolute rulers independent of law. Grotius approves St. Thomas's interpretation of the fifty-first Psalm as to the irresponsibility of princes and their superiority to law; Gentilis, though writing earlier, shows himself to be more in harmony with modern views when he asserts that it is a hallucination of theologians, mere adulation of lawyers to represent to kings that they are permitted to do everything, and that their sovereignty is absolute.[4]

Finally, having conceived of a "societas gentium" on a civil basis, a

[1] Victoria likewise denied the Pope's claim to be "dominus orbis" in things temporal, and rejected the alleged world lordship of the Emperor as being contrary to the *ius naturale, divinum*, or *humanum* (*Relect. theol.* I. 6; V.).

[2] Cf. *De legat.* II. 18: "Habet ius gentium rationes naturales quæ, insitæ omnibus a natura, sic notæ sunt ut argumento nullo indigeant, nullaque, quibus adprobentur, arte."

[3] Cf. *De iure belli*, I. 3; p. 16.

[4] *Ibid.* III. 15; p. 357: "Hallucinantur theologi, adulantur iurisconsulti, qui persuadent omnia principibus licere, summamque eorum et liberam esse potestatem."

system of rules freed from the bonds of theological casuistry, Gentilis took a further step—a remarkable one, though a corollary flowing from his general thesis—and included in this society of States infidel and even barbarian communities.[1] The common opinion of writers was that only Catholic, or, at most, Christian princes could be vested with *dominium*; but Gentilis held that heretics and infidels could legitimately enjoy the right of sovereignty in their own domains. Heresy or infidelity or even idolatry is not intrinsically a just cause of war.[2] Treaty relationships may be established with peoples of this character,[3] who possess also the right of legation.[4] On the other hand, those who have no religion at all are in the position of pirates,[5] as the natural enemies of mankind, and are therefore outside the pale of the society of States; they are on the level of the lowest brutes and are in a sense opposed to God and to nature, and consequently ought to be warred upon and compelled to follow the ways of the rest of mankind.[6] As to brigands and other marauders, it was also a universally established rule that they, like pirates, could not take advantage of the law of nations, "neque prædones eo iure gentium fruuntur aut piratæ"[7]; and Gentilis expresses astonishment at the contrary assertion of Hotoman: "Ergo miror Hotomannum adfirmare voluisse ius gentium imo et cum fugitivis et cum prædonibus esse."[8]

2. **International Relations: Freedom of Intercourse; Freedom of the Sea.**—From the conception of the world as a community of States, autonomous and independent, whose relationships are regularised, whose transactions depend upon the principle of *societas*, which is itself of the essence of natural law, it follows that, subject to the exercise of territorial sovereignty, both the earth and the sea belong to all. Hence innocent passage over a nation's territory cannot legitimately be refused, and all have the right to undisturbed maritime navigation, to carry on commercial intercourse in general, to secure shelter in foreign ports, to enjoy the right of market. To deny such natural rights without good and sufficient cause is a violation of the fundamental principles of *societas*, and consequently is not only an unlawful injury to the party directly involved, but an offence against human society in general.[9] And for the purpose of vindicating such rights war may be justly declared—"si iter negetur, si portubus, si commeatu, si

[1] Victoria had already in a modified form advanced this view, in his discussion of the rights of the Spaniards in the Indies (*Relect. theol.* V.).

[2] *De iure belli*, I. 25. Cf. Victoria, *Relect. theol.* V. 10. (See further *infra*, on grounds of war.)

[3] *De iure belli*, III. 19. [4] *De legat.* II. 11.

[5] *De iure belli*, I. 4; p. 21: "Piratæ omnium mortalium hostes sunt communes."

[6] *Ibid.* I. 9; p. 39: "At neque nos nunc de his qui, ferarum modo magis quam hominum viventes, sine ulla omnino religione sunt; hos enim quasi piratas, communes hostes omnium, bello persequendos, et cogendos in mores hominum arbitrarer. Hi enim vere videntur iniurii omnibus hominibus, qui in specie hominum agunt brutorum brutissimorum. . . . Hi sunt, qui gigantum more bellum gerunt cum Deo."

[7] *De legat.* II. 8. [8] *De iure belli*, I. 4; p. 21.

[9] *Ibid.* I. 19; p. 84: "Sane qui ista tollit, societatem humanam lædit."

mercatura, si commercio excludimur."[1] That is why, says Gentilis, war was made on the Turks: their attempt to refuse passage to the Christians, who were proceeding against the Saracens, was unjustifiable.[2]

The question of the right of passage was long one of the great controversies in which opinions were sharply divided and recorded practices opposed to each other. Gentilis, following the view of St. Augustine, decides in the affirmative,[3] on the ground firstly that it is a right conferred by nature, and secondly, that the normal condition of mankind is peace and amity, not war and enmity. The right, however, is not an unrestricted one. Freedom to traverse another's field does not imply freedom to hunt there without the owner's permission[4]; much less does it imply any liberty to commit acts of war there without the licence of the sovereign of the territory. It is customary, however, and in better order to obtain a safe-conduct; so that having become general, the practice may be considered to have been incorporated into the law of nations.

The right of navigation follows from the principle that the sea, like the air, is naturally free to all, and is the exclusive property of no one.[5] Similarly, shores,[6] banks, international rivers,[7] ports, harbours, are open to all for the purpose of obtaining shelter and provisions, and assuring the various reciprocal rights and duties of hospitality. The local sovereign has only the right of supervision and jurisdiction.[8] Hence the claim of peoples to the exclusive sovereignty over adjacent or even territorial seas is invalid—as, for example, in the case of Venetian pretensions as to the Adriatic. Any attempt on the part of the people of Venice to close that sea on the ground of their being "possessores" (as was alleged), or "domini maris" (an obviously indefensible contention), is nothing more than a deliberate usurpation. Similarly (it may be recalled), in the conflict between England and Spain in 1580, when the Spanish ambassador, Mendoza, laid before Elizabeth complaints as to certain acts of Drake, the Queen strongly contended that all were at liberty to navigate the ocean, as the use of the sea, like that of the air, is common to all; that neither a sovereign nor a nation could claim exclusive right thereto, since its occupation is contrary both to the course of

[1] *De iure belli*, I. 19, pp. 81-2. [2] Cf. *Advocatio Hispanica*, I.

[3] Similarly Bonet, *L'arbre des batailles*, held that a sovereign has a right of passage and provisioning, if he undertakes to cross peacefully, to pay any expenses involved, and make good any damages inflicted.

[4] *De iure belli*, I. 19; p. 83: "Transire per agrum alienum fas est. Ingredi fundum alienum venandi caussa, licet item per gentium ius, et ergo nec fuerint iniusti, si qui transeunt venia non petita, nec prohibiti. . . . Venatio incommoda est agro. Transitus non est incommodus."

[5] *Ibid.* I. 19; p. 86: "Hoc natura omnibus patet; et communis eius usus omnibus est, ut aëris. Non igitur prohiberi á quoquam potest."

[6] *Advocatio Hispanica*, I. 6: "Mare etiam est commune omnibus, et littus maris."

[7] *De iure belli*, i. 19; p. 86: "Littora item a natura omnibus vacant; item ripæ; item flumina."

[8] *Ibid.* p. 88: "Proprieate nullius; iurisdictione et protectione sic sunt principis."

nature and to public usage.[1] A like argument was used in 1602, against the Danish king's claim to dominion in the northern seas, and his attempt to prohibit fishing without a licence from him.[2]

Finally, as to the right of commerce, intercourse, etc., Gentilis points out that the Spaniards rightly made war on the people of the New World for refusing to trade with them.[3] In the Anglo-Spanish dispute, above referred to, the Queen reminded the ambassador that his countrymen had brought upon themselves the injuries complained of through their excluding the English, "contra ius gentium," from commercial intercourse with the West Indies; and she did not recognise the power of the Pope to bestow these territories on the Spanish king.[4] To constitute such refusal a ground for war, says Gentilis, the prohibition must be a general one. It is not unlawful to forbid the importation of certain goods deemed to be injurious, or the exportation of certain precious products like gold and silver. To deny to foreigners internal trade, whilst allowing them access to the coasts or frontiers, does not necessarily amount to a breach of the *ius commercii*.

3. **International Relations: Ambassadors.**[5]—After defining ambassadors and pointing out their public and sacred nature,[6] Gentilis distinguishes legations according to the character of the one who despatches and the one who receives them; and also according to the object in view, *e.g.* free embassy ("libera legatio"),[7] where a person bearing the title of ambassador goes to treat of his own affairs; public embassy, including "legatio negotii," extraordinary, as for declaring war or peace, and "legatio officiosa," as for offering compliments, condolences, etc.; temporary missions, in which case the "legati temporarii" are called "residentes."[8]

The reception of public envoys may not be refused, except for a just and good cause; but a sovereign is entitled to refuse at any time titular, "officious," and temporary embassies.[9] Thus Henry VII. of England rightly refused to receive "residents." The right of legation is suspended at the commencement of hostilities; the ambassadors of the respective belligerents are not to

[1] Camden's *Annals*, sub ann. 1580, p. 309, ed. 1605.

[2] See further on the subject the article on Bynkershoek, *loc. cit.* pp. 34 *seq.*

[3] Similarly Victoria (*Relect.*, V.) maintained that the Spaniards had the right of journeying to and remaining in Indian territory, and trading with the natives, provided no injury was done. In case of opposition, the Spaniards were entitled to make war in self-defence, and occupy the territory of the conquered people.

[4] Camden, *ibid.*

[5] Cf. the article on Bynkershoek, *loc. cit.* pp. 36 *seq.*, and on Zouche, *loc. cit.* pp. 293 *seq.*

[6] *De legat.* I. 2:—". . . qui publico, aut sacratiori nomine ad rempublicam personamve aliam sacratiorem ob rem publicam, aut sacratiori missus sine imperio est rei dicendæ, agendæ caussa."

[7] Cf. the Roman practice, *Int. Law and Custom of Anc. G. and R.*, I. p. 308.

[8] *De legat.* I. 5.

[9] *Ibid.* II. 12: "Puto autem liberas legationes, officiosas, temporarias tales esse."

be treated as enemies, but are to be sent back in safety to their sovereigns.[1] As pirates and brigands are outside the law of nations, they do not enjoy the *ius legationis*;[2] nor do rebels as against their ruler.[3] But heretic and excommunicated sovereigns and peoples cannot merely as such be deprived of the right, for they still belong to the society of States, which is based on political and not on religious considerations.[4] Thus when Pope Julius II. laid Venice under an interdict, she none the less retained the right, as guaranteed by the law of nations. Similarly, embassies of Protestant, Mahometan, and Jewish peoples were always admissible, in accordance with the demands of natural reason.[5] In the case of a civil war, if the contending factions are approximately equal in power so that they regard each other as "iusti hostes" and not as mere rebels,[6] they may justifiably despatch ambassadors to one another and to other States.[7]

The most important matters relating to ambassadors are the closely connected questions of inviolability and exterritoriality. On this portion of international law Gentilis exerted a profound influence both by his personal counsel and by his writings. He holds that ambassadors are not necessarily everywhere inviolable, but only within the territories of the State to which they are accredited.[8] Nevertheless they ought in all cases in every quarter to be courteously treated, as they are promoters of peace and good understanding, and represent the *persona* of the sovereign or the commonwealth.[9] Legates sent on a purely sacred mission are always and everywhere inviolable. All alike are entitled to undisturbed passage over any intermediate territory.[10] An envoy who is discovered to be really a spy,[11] or to be engaged in other treacherous conduct towards a sovereign or nation, or who has committed any other criminal offence, ought to be sent back to his country, and not subjected to any harsher personal treatment.[12] If, however, the ambassador inflict a personal injury on the sovereign, he is liable even to the capital penalty; and his own prince ought in such a case to surrender him to the jurisdiction of the offended State.[13] The general privilege of security extends also to the suite, their goods, and their residence.[14]

As to the civil local jurisdiction, Gentilis lays down certain restrictions on

[1] *De legat.* II. 13: "Legati abire iubentur, si eo tempore eos in regno suo degere princeps nolit."

[2] *Ibid.* II. 8. [3] II. 7. [4] II. 11. [5] II. 11.

[6] II. 10 (title): "Nec a subditis nec ad subditos recte mittuntur legati.—Non esse ius legationis cum suo domino subditis, hinc patet, quod potentioribus et dominis pares esse non possumus."

[7] II. 9.

[8] II. 3: "Legati ex ipso nomine ad alios non sunt [tuti], nisi ad quos legantur. Cum aliis ergo iura legationis non obtinent."

[9] II. 3. [10] *Ibid.*

[11] II. 4: "Ceterum cum legato speculatore non arbitror agi durius posse, quam ut non admittatur, vel expellatur admissus."

[12] II. 18: ". . . quia legatus quoque principis personam gerit.'

[13] II. 19. [14] II. 15.

the ambassador's immunity. In questions arising out of contracts entered into on foreign territory during his official residence there, he is to be subject, like any other domiciled alien, to the local tribunals[1]; for, otherwise, he might be able to take advantage of his position and unjustly deprive a subject of his property, and hence no one would be willing to make any engagement with him.[2]

The view of Gentilis expressed here respecting the ambassador's exemption from the territorial criminal law had already been advanced by him in 1584, when he, together with Hotoman, was consulted on the Mendoza affair. The Spanish ambassador was, on Throckmorton's confession, charged with complicity in the plot to liberate Mary Stuart and depose Elizabeth. The English Government was at first inclined to adopt stringent measures against Mendoza, some of the members of the Council arguing that "in vaine he putteth himselfe under the safeguard of nations which violateth the lawe of nations." However, the opinion of Gentilis prevailed, in spite of the contrary precedent of Leslie, Bishop of Ross; and the Government ordered the expulsion of the offending envoy, and the despatch of one of the Secretaries to the Privy Council to explain to the Spanish sovereign the reason for this action.[3]

4. **International Relations: Treaties.**—Gentilis emphasises the doctrine that a king exists for his State, and not the State for the king—"non regna esse propter reges, sed reges propter regna factos esse."[4] Hence certain duties are imposed upon him, and certain restrictions on his conduct are laid down. The monarch has always to consider the good of his country, and not merely his own personal advantage. He is not the absolute proprietor of his dominions, but only the administrator thereof, the "tutor," the "curator," the "usufructuary."[5] He cannot enter into any engagement to the palpable detriment of his kingdom.[6] He cannot by treaty alienate his kingdom, and no authority, papal or even that of his people, can confer such power on him.[7] If such a convention is concluded, the successors of the sovereign who has thus acted *ultra vires* are not bound thereby. A

[1] II. 16: "De omni autem contractu, quem tempore legationis iniit, subire eum iudicium volo."

[2] *Ibid.* In regard to this provision, Gentilis refers to the statements of Julian and Paulus in the *Digest*, and was perhaps unduly influenced by certain rules of Roman law.

[3] *Cal. of State Papers, Spanish*, 1580-6, pp. 513-15; Birch, *Memoirs of the Reign of Q. Eliz.*, I. 458; Hotoman, *The Ambassador* (1603), pp. 103-6. Opinions on the extent of the ambassador's privilege varied considerably; but it may be pointed out that even before 1584 certain writers had advocated total immunity; *e.g.* Ottaviano Maggi, *De legato* (1566), Pierre Ayrault, *L'ordre, formalité et instruction judiciaire* . . . (1576). [The present writer may say that, in common with all students of the earlier history of international law, he is much indebted to the writings of Prof. Nys.]

[4] *De iure belli*, I. 16; p. 73. [5] *Ibid.* III. 22; p. 395. [6] *Ibid.*

[7] *Ibid.* III. 15; p. 357: "Omne dedit populus imperium et potestatem sane: sed ad regendum quasi homines, non ad alienandum quasi pecudes. . . . Aut num plus dederit populus, quam ipse habuit? Ipse populus non id poterat."

prince is entitled, however, to dispose of tribute and other such sources of profit.[1] Only despotic rulers like the Sultan, whose subjects are no better than slaves, can consent to such alienations. Further, a ruler can make no stipulation for single combat instead of regular war when the latter has become necessary and is legitimate.[2] A treaty concluded by the sovereign in person has binding force as soon as he has signed it, but if entered into by his representative it is not binding until due ratification.[3]

Are sovereigns and peoples bound by the legitimate conventions of their predecessors? Gentilis says that the common opinion is that treaties of peace are in general binding on successors, in the same manner as pecuniary obligations; but not necessarily so pacts of friendship and alliance—on the ground that the nature of *societas* implies only personal relationships, wherefore a contracting party cannot stipulate for the continuation of the engagement after his death. But such a distinction, urges Gentilis, is to be rejected, for the question of personal relationships enters into private undertakings but not in a *societas* of a public character. In actual practice, however, it is better for successors formally to renew alliances[4]; but renewal may be inferred from a variety of acts or words or even from acquiescence.[5]

Treaties of peace must be so clearly and definitely drawn up as to make subsequent controversies thereon impossible[6]; and in this connection Gentilis devotes two chapters to consider how certain clauses, stipulations, and terms (*e.g.* army, fleet, arms, fortification, etc.) ought to be construed.[7] Like all engagements of sovereigns, they are contracts of good faith, and not *stricti iuris*, as Baldus claims.[8] Before the time of Gentilis it was generally held—and the doctrine was by no means obsolete in his day—that the binding force of treaties depended on the oath, that the Pope could compel a refractory signatory to respect his pledged word, and that infringements were ecclesiastical offences.[9] Thus in the Treaty of Arras (1435) Charles VII. specifically recognised such papal sanction; Edward IV. begged the Pope to cancel his oath; and again in the treaty of 1514 Henry VIII. and Francis I. admitted

[1] *De iure belli*, III. 22; p. 395: "Potest princeps vectigalia et alia emolumenta alienare."

[2] *Ibid.* III. 15.

[3] *Ibid.* III. 23; p. 403: "Nec satis est stipulatio notarii pro absentibus; non eos enim tenet, nisi secuta ratificatione."

[4] *Ibid.* III. 22; pp. 400-1: "Successores tenentur, si contractus sint ex natura et consuetudine principatus; ut isti quidem sunt pacis et fœderum. . . . At probandum est maxime, quod et fieri consuevit, ut fœdera cum successoribus renoventur."

[5] *Ibid.* pp. 401-2: "Renovatur porro his actis, gestis, quæ admitti citra nomen et ius societatis non valent. . . . Ut adfirmata et renovata censeatur, si reliqui in fœdere pergant tacite."

[6] III. 14; p. 347. [7] III. 20-21.

[8] III. 14; p. 347: "Stricti autem iuris contractum, ut transactionis, dicit Baldus. At ego contrarium docui. . . . Contractus [principum] omnes sunt bonæ fidei. Est omnis principalis tractatio ex bono et æquo; omnis consuetudinum et institutorum gentium."

[9] Cf. Martinus Laudensis, *De confœderationibus, pace et conventionibus principum*, Quæst. 19 and 22.

the power of the Pope's Bull to enforce agreements under pain of excommunication. Treaties of peace are not vitiated through fear—for this is an essential concomitant of war.[1] The engagements of captive princes are binding on them, if their capture has been legitimately effected; but their subjects are not obliged to obey them.[2]

As to pacts of friendship (*amicitia*) and alliance (*societas*), the first imply only general obligations of a moral character, as, for example, the furnishing of assistance, whilst the second are of two kinds, *ἐπιμαχία*, defensive, and *συμμαχία*, both defensive and offensive. But a pact or an alliance ceases to be valid if an illicit object be involved, or if illegitimate or irregular hostilities are to be made.[3] Should war break out between two States, to both of which a third is bound by treaties of friendship, the latter ought to be guided, where conflicting duties appear, by certain general considerations. Aid should be offered in order to equalise as nearly as possible the condition of the contending parties,[4] or given to the State having greater justice on its side,[5] but if there be doubt on the point, then the prior alliance might decide.[6] The defending State has, other things being equal, a better claim than the offending.[7] Both may receive aid in money, provisions, etc.[8] If it is doubtful which of the belligerents acts more in accordance with the treaty, each appealing to it in support of its claim, no aid ought to be offered to either[9]; and similarly, if neither side can be satisfied and there is no valid reason for assisting one rather than the other.[10]

Is it legitimate to conclude pacts with infidel peoples? Treaties of commerce are allowable, for such depend on the law of nature, the fundamental law of men at large.[11] As to other contractual relationships, it is lawful to hold people of a different religion in an unequal league, *e.g.* as

[1] III. 14; p. 349: "Metus est de natura victoriæ . . . et ergo servanda pacta ab eo, qui sub duello vincitur et paciscitur; et idem de pactis deditionis belli."

[2] III. 14; p. 351: "In principe captivo hoc putem, non esse necesse ut ei obtemperent subditi."

[3] III. 18; p. 372: "Neque enim rei turpis societas intelligitur, neque confœderati intelliguntur ad bellun illicitum."

[4] III. 18; p. 374: "Ut uni auxiliemur, quum nec est aliter condicio par sociorum."

[5] III. 18; p. 375: "Ut causæ iustiori auxiliemur."

[6] *Ibid.*: "Inque pari causa is sit potior qui est tempore prior."

[7] *Ibid.* p. 376: "Ut utrique fœderato, bellum gerenti invicem, non sit auxilium ferendum."

[8] P. 377: "Quod si tamen auxilia essent alterius generis, ut commeatuum, pecuniarum; tum afferri utrique possent et vero deberent."

[9] P. 376: "Quum et est dubium, quis duorum pluriumve petitorum agat pro iure fœderis, quod quisque pro se citant . . . ut nemini auxilium præstetur."

[10] P. 378: "Si fœderatus nequit utrique satisfacere: et causa non est cur uni magis quam alteri satisfiat: ut neutri auxilia ferantur."

[11] III. 19; p. 384: "Commercium non interdicitur cum infidelibus . . . et lex omnibus humana iubet commercium cum hominibus omnibus. . . . Dico licitum fœdus universale commerciorum."

tributaries[1]; and, inversely, a league of this nature is legitimate when a Christian nation is forcibly subjected to infidels.[2] Under no circumstances may an alliance be made with infidels as against believers[3]; hence the league of Francis I. with the Turks must be condemned.

With regard to facts vitiating conventions, and to circumstances in which treaties may be renounced, Gentilis says that, as in the case of private contracts, fraudulent misrepresentation and substantial error avoid treaties.[4] Otherwise the public compacts of sovereigns are to be interpreted by the law of nations and not by the civil law. Thus the fact that one of the signatories is a minor is not a valid reason for renouncing the treaty; so that the claim of the young King Edward III. respecting his treaty with the Scots was invalid. In international compacts the question in such cases is not minority, but actual exercise of sovereignty.[5] The clause "rebus sic stantibus" is always understood[6]; a radical change of circumstances or the occurrence of new disputes may excuse the performance of one or other of the conditions previously laid down.

A treaty is violated if the State, and not merely private subjects, deliberately acts in contravention of any clause. If one party conducts an expedition against piratical subjects of the other,[7] or offers asylum to its exiles when not specifically prohibited in the convention, there will be no breach. It is otherwise if enemies are knowingly harboured, or the surrender of deserters and other fugitives is refused on demand being made.[8] As every treaty is one and indivisible, it may be repudiated *in toto* when any one of the conditions is not fulfilled by the other side, or when its execution becomes impossible. Necessity and *vis maior* are sufficient grounds for non-performance; but in every such case the alleged cause must be just, and not an excuse for evasion.[9] Wilful renunciation exposes the offending party to the vengeance of the other: though it does not entitle that other to resort to acts of perfidy in subsequent negotiations with the treaty-breaking State.

II. International Law in Time of War.

1. **Character and Aim of War; Conditions of Just War.**—Gentilis points out that the regulation of war depends on practices definitely agreed upon, on general customs tacitly followed, and on natural law; but not, as

[1] III. 19 p. 384. [2] P. 385. [3] P. 385. [4] III. 14; p. 351.

[5] III. 14; p. 351: "Sed quid si fœdus percussum est cum minore? Et Edvardus tertius Angliæ negabat se fœdere teneri, quod se minore cum Scotis ictum erat. Atque hic tenendum sic est, non eum esse minorem, qui iure regnandi aptus regno est et muneribus regni."

[6] *Ibid.* [7] III. 23; p. 406. [8] P. 407.

[9] III. 24; p. 410: "Fœdus non violatur, si ab eo discediturper rationem iustam"; p. 414: ". . . Qui promittit non offendere, is subintelligit exceptionem, 'Nisi causa superveniat: Nisi culpa accesserit eius cui promissio ista fit et pactio fœderis: Rebus sic stantibus.'"

was the case in earlier times, on Roman and ecclesiastical law. War is not the normal condition of peoples; it behoves all to try always pacific settlement by means of diplomatic negotiation and conference, "disceptatio," by submission to arbitration (of which mode of settling conflicts various examples are cited), or by other peaceful means indicated by natural reason, rather than by rushing to arms, or resorting to other violent remedies.[1]

His definition of war is the briefest and most precise that has ever been enunciated: "Bellum est publicorum armorum iusta contentio."[2] This includes the three essential elements: (1) a public contest between sovereigns (hence excluding private differences, "rixa, pugna, inimicitia privatorum")[3]—war being justified only by the absence of a superior tribunal competent to settle the dispute and able to enforce its judgment[4]; (2) by force of arms; (3) begun and conducted in a just and regular manner, in conformity with the law generally established and adopted by both belligerents[5] (hence excluding irregular hostilities, like "excursiones," "populationes," "prædationes," "latrocinia,"[6] which are the acts of brigands and freebooters—"latrunculi," "prædones"—and not of regular enemies, "iusti hostes").[7] The definition of Grotius, who speaks of the condition of parties maintaining a contest by force,[8] is too wide and indefinite, and may also imply conflicts like private war or single combats.

A *iustum bellum* is not required as against pirates and brigands or rebels,[9] who, wilfully withdrawing from the human community and from the institutions of human law, have forfeited all rights guaranteed thereby. Even formal promises made to them need not be kept.

The justice of a war depends on the legitimacy and sufficiency of the alleged cause. A war is justifiable if made on the grounds of necessity,[10] *e.g.* self-defence, public safety, and sometimes on the grounds of "utility" and "honour." Justice may exist on both sides, if it is doubtful which has the superior right, as Victoria and others held.[11] Several writers before Gentilis, *e.g.* Baldus, Joannes Lupus, Arias, Victoria, Wilhelmus Mathiæ,[12]

[1] I. 3, p. 19: "Voluntario compromisso antea est disceptandum, et ratione naturali."

[2] I. 2; p. 10. [3] I. 2; p. 11.

[4] I. 3; p. 13: ". . . quoniam inter summos principes populosve liberos fori disceptationes esse nequeunt, nisi inter volentes . . . non est principi in terris iudex." (This point had been emphasised by Franciscus Arias, *De bello et eius iustitia tractatus*, in the first half of the sixteenth century.)

[5] I. 2; p. 12: "Sic iustum, non solum quod a iure est, sed et quod est ex omni parte perfectum, significat."

[6] I. 2; p. 13.

[7] I. 3; p. 13. (In this connection Gentilis accepts the definitions and distinctions laid down by Pomponius and Ulpian.)

[8] *De iure belli et pacis*, I. i. 2.

[9] I. 4; p. 20: "Cum piratis et latrunculis bellum non est"; p. 21: ". . . ius belli a gentium iure est; et tales non fruuntur illo iure, cui hostes sunt."

[10] I. 3; p. 19: "Itaque concludo quod si necessitas non subsit, bellum esse iustum nec possit."

[11] I. 6; p. 28. [12] *Libellus de bello iusto et licito* . . . (Antwerp, 1514).

had laid down the conditions of a just war, and had invariably insisted on the criterion of necessity, apart from just and sufficient causes and regular proceedings. In some cases difference of religion as an alleged ground was condemned, in others pursuit of self-aggrandisement and vainglory, in others, again, slight injury. From time to time the conditions of lawful war were in a more or less fragmentary manner investigated, and usually from the point of view of war against Christian nations. But no one before Gentilis or at the time he wrote examined all these questions as fully, as logically, as rationally, and as impartially as he did.

2. **Grounds for War.**—Religious difference, as in the case of heretic or infidel nations, is not a ground for war; for no one should be compelled to accept another faith unwillingly.[1] Moral persuasion and intellectual argument are justifiable for bringing others over to our faith, but not so physical force—as religion has to do with the mind and the free will.[2] Religion is, as it were, a union of God and man[3]; and God alone has dominion over the soul. Hence hostilities against heretics and infidels, simply because they do not share our faith, are unjust, as Victoria maintained.[4] Gentilis criticises Baldus in that he confused the spiritual motive of the Church with the temporal objects in her wars against infidels, and confutes his assertion that infidel kings cannot exercise legal sovereignty over their territories. "Sacred" wars are justifiable only on the ground of urgent necessity; though an exception might perhaps be made in the case of wars against people without religion altogether, who are thus practically on a level—so far as an ordered "societas gentium" is concerned—with pirates and other enemies of mankind at large.[5] Further, a sovereign cannot by war compel his subjects to adopt his religion[6]; they may lawfully change their faith if the State does not thereby suffer any real injury—"nisi quod detrimenti illinc respublica capiat."[7] And the sovereign enjoys a similar liberty.[8]

Just as in private transactions the right of action may be barred by lapse of time, so in international affairs the principle of prescription may operate to extinguish old causes of war and other claims.[9] Thus the Emperor is not entitled to regain possession by force of arms of the territories which were formerly part of the Roman Empire. The frequently advanced theory of the Holy Roman Empire is absurd; the "imperium romanum," says Gentilis, is no more, and a new order of things now exists.[10] The decease

[1] I. 9.

[2] I. 9; p. 36: "Religio autem ab animo est, et voluntate." (This question may be of no account nowadays, but it was of supreme importance when Gentilis wrote his work.)

[3] I. 9; p. 37: "Coniugium quoddam Dei et hominis est religio"; p. 39: "Religio erga Deum est."

[4] *Relect.* V. 10. [5] I. 9; p. 39. [6] I. 10. [7] *Ibid.* [8] I. 11.

[9] I. 22; p. 99: ". . . Si vetustæ causæ afferri possunt ad bellum faciendum. In qua ego sane arbitror, non afferri posse." [10] I. 23.

of a prince does not necessarily cause the rule as to prescription to operate; his successor may justly be liable to be warred upon if he refuses to make reparation for an unatoned offence on the part of the predecessor.[1]

As to the legitimate causes of war, that is, those which "materiam belli præbent,"[2] they may be divided into three main classes: divine, natural, human.[3] Under the first head may be mentioned the express command of God,[4] as in the case of the divine injunctions to the Israelites, the utterances of the oracles and soothsayers in Greece and Rome. "Natural" causes [5] have sometimes been urged (*e.g.* by the Jews against the Canaanites, by the Greeks and Romans against the "barbarians," by the Christians against the Saracens, etc.), on the ground of some alleged innate hostility between certain classes of men. But, says Gentilis, this is a false assumption; all men belong to one class—the human species; there is no fundamental antagonism between them; rather their natural kinship is self-evident and predominant.[6] The Christian wars against the Turks were lawful, not for religious reasons, or for reasons of natural enmity, but because of their perfidious, harassing, hostile conduct; whereas had they remained peaceful any attack on them would have been illegitimate.[7]

Self-defence is an instinct implanted in all living beings, and is a "natural" reason for taking up arms.[8] Self-defence may be immediate, "necessaria defensio." It may be anticipatory, "utilis defensio," against an attack prepared or meditated,[9] or even when it is probable; in other words, when balance of power is to be maintained. To render anticipatory steps lawful, however, there must be reasonable cause for apprehension. Hence, resistance may be justly offered to the Turks and to the Spaniards, as it is manifest they are aiming at universal dominion.[10] Further, there is "honesta defensio," [11] which permits help to be given to a nation against its unjust aggressors [12]: for the "generis humani societas" is a unity, the world is one body, "mundus unum est corpus." [13] Gentilis quotes with approbation the statement of Ambrose [14] as a principle of canon law: "Plena est iustitia quæ defendit infirmos." [15] May we defend the subjects of another State as against their

[1] I. 24. [2] I. 7; p. 33.

[3] *Ibid.*; just as law was commonly divided into "divinum," "naturale," and "humanum"; cf. Victoria, *Relect.* V. 1.

[4] I. 8. [5] I. 12.

[6] I. 12; pp. 52-3: "Et itaque hominibus cum hominibus non est repugnantia per naturam. Sed neque antipathia est inter animalia eiusdem speciei."

[7] I. 12; p. 55: "Non inferendum bellum quiescentibus, pacem colentibus, in nos nihil molientibus."

[8] I. 13; p. 56: "Vim vi repellere, omnes leges, et omnia iura permittunt. Lex una, et perpetua, salutem omni ratione defendere."

[9] I. 14; p. 57: "Utilem dico defensionem, quum movemus nos bellum, verentes, in ipsi bello petamur."

[10] I. 14. [11] I. 15.

[12] I. 15; p. 66: "Non aliena homini res est hominum tueri rem et salutem."

[13] *Ibid.* p. 64. [14] *De off.* I. 27. [15] I. 15; p. 68.

sovereign ?[1] If the dispute between them is a private one, it is a question for their own tribunals ; but in a public conflict, in which a great number of subjects rebel against their ruler, we may intervene if it is clear that he is grossly unjust or cruel ; hence the justifiable intervention of England in the Netherlands, especially so in view of the ties of old friendship and consanguinity. Gentilis heartily approves of the Earl of Leicester's policy in favour of the Belgians, and agrees with Justus Lipsius that Spanish violence would be left unrestrained if that part of the continent fell.[2]

Apart from the law of defence in general, which concerns rather the warding off of war than the making of it, there are "natural" causes for declaring hostilities.[3] These grounds refer to motives of necessity, utility, and honour.[4] Examples of necessity are—when foreigners are refused civil rights, or if the immigration to and occupation of vacant territory be interfered with ; of utility—avenging injuries received and so making it impossible for others to be committed,[5] vindicating violated natural rights, such as the rights of intercourse, passage, navigation, shelter,[6] in the absence of good reasons for refusal ; of honour—making war not merely on one's own account, but "communi ratione et pro aliis," *e.g.* against cannibals, people who practise immolation, or indulge in bestial vice.[7]

Finally, "human" causes of war appear when an offended State proceeds to exact reparation for violated positive rights.[8] The alleged reason must not, however, be a trifling one, "levis causa" ; one must not rush to arms on the least provocation, but only when war is really necessary. Moreover, the violation of these rights must be the work of sovereigns or peoples ; for the acts of private subjects are not necessarily the acts of their State, unless it acquiesces when several offences have been committed.[9]

3. **Conduct of War.**—Not only must the cause of war be just, but the war must be begun and conducted justly ; otherwise it would be as wrongful and odious as murder.[10] Public declaration is necessary, and a certain delay is to be thereafter made, as in the Roman *rerum repetitio*, in order to give an opportunity for peaceful settlement.[11] Proclamation may, of course, be omitted in the case of a sovereign as against his rebel subjects, or in that of a suzerain as against his subordinate rulers.[12] An immediate effect of declared war is the cessation of commercial relationships.[13]

[1] I. 16. [2] *Ibid.* [3] I. 17.

[4] I. 17 ; p. 75 : "Atque bellum quidem infertur eodem modo, aut necessarie, aut utiliter, aut honeste."

[5] I. 18 ; p. 79. [6] I. 19 ; pp. 81-2. [7] I. 25.

[8] I. 20 ; p. 89 : "Quum violato aliquo iure hominum ad bellum descenditur."

[9] I. 21 ; p. 94 : "Non imputatur universitati delictum singulorum" ; p. 96 : ". . . civitatem teneri pro delictis civium non momentaneis, sed successivis, continuatis."

[10] II. 2 ; p. 133 : "Et iniustum, et detestabile, et internecinum bellum est : id est, quod nulla lege belli, sed pro libidine geritur ; et in quo omnia iura belli merito cessare videntur."

[11] II. 1 ; p. 124. [12] II. 2. [13] I, 21 ; p. 97.

The employment of assassins is unlawful[1]; of spies lawful, but at the risk of their lives; similarly of traitors as against traitors.[2] The use of poison,[3] magic arts, serpents, savage beasts, is forbidden; of elephants, horses, dogs, allowed.[4] Stratagems are permissible,[5] but these do not include perfidious conduct; both acts and pledged words must be *bonæ fidei*[6]; apart from this there may be cases in which it would be justifiable to deceive the enemy by a lie, *e.g.* as Themistocles did.[7]

Gentilis approves of the opinion of Polybius[8] that the laws of war permit the destruction of fortresses, towns,[9] villas, gardens, ships, productions, in order to weaken the enemy and bring the conflict to a speedy conclusion; but all useless destruction, *e.g.* of temples, porticos, statues, fruit-bearing trees, and other "res innoxiæ," and all violation of sacred objects, *e.g.* altars, sepulchres, must be condemned.[10] He differs from Polybius, however, in allowing temples to be destroyed in certain circumstances: by way of retaliation, if the enemy does not respect them or has not done so in a previous war; if the enemy has already profaned them; and if they are an impediment to victory.[11] As against barbarians, and in cases of exceptional urgency, such usually forbidden acts may be lawful.[12]

With regard to the person of the enemy, it is laid down that non-combatants, including women, children, harmless and undefended persons, peaceful peasants[13] (who are held to be in the same position as foreign merchants[14]), are exempt from the ordinary hostile treatment. Suppliants

[1] II. 8. [2] II. 9.

[3] Other writers were in this respect less humane, *e.g.* Michel d'Amboise, *Le guidon des gens de guerre* (1543), who says one may "gaster, infester, intoxiquer et empoisonner les eaues des ennemys."

[4] II. 6-7. [5] II. 3. [6] II. 4.

[7] II. 5 (in accordance with the doctrines of Gratian, *Decretum*, II. 23. 11. 2, and Thomas Aquinas, *Summa Theologiæ*, II. 40. 3).

[8] Cf. *International Law and Custom of Anc. G. and R.*, II. pp. 248 *seq.*

[9] Belli, writting in 1558, was against the destruction of towns, in the absence of serious offence on the part of the enemy: "Non deberent urbes diripi, nisi pro magno flagitio . . ." (*De re militari*, IV. 8).

[10] II. 23; p. 261: "Bellum certe neque adversus Deum, neque adversus res sacras, sed est adversus armatos." Thus, in the instructions given to the Earl of Essex, June 1597 (the work of Gentilis had already been published in London by 1589), the violation of hospitals and all sacred places was forbidden.

[11] II. 23; p. 264.

[12] Cf. Victoria (*Relect.* VI. 52), who emphasises that excesses are to be avoided, unless absolutely demanded by "necessitas."

[13] II. 21. Similarly, Victoria (*Relect.* VI. 36) insists on the protection of "innocentes," including "innoxii agricolæ, gens togata et pacifica." Belli does not except women and children. It may be recalled that when Leicester took command of the forces in the Netherlands, 1584, it was laid down in the *Laws and Ordinances*: "That no man . . . shal lay violent handes upon any woman with childe, or lying in childebed, olde persons, widowes, yong virgines, or babes, without especiall order from the magistrate, upon paine of death" (*State Papers, Dom., Elizabeth*, cclxiii. 102).

[14] II. 22. See *infra* as to the position of foreign merchants within the territory of the belligerents.

eeking refuge in sacred places are by the unanimous opinion of the world onsidered inviolable.[1] Hostages are not in the position of prisoners of ar, though they are debarred from making a will. They are not to suffer or the breach of faith of their countrymen.[2] Fugitive hostages may be put o death; to receive them is an offence against the law of nations.[3] Both atural and divine law command that prisoners are not to be put to death; he practice has sometimes been otherwise, but not everything so permitted to be approved.[4] Rigorous treatment, however, may be resorted to in xceptional cases, *e.g.* by way of reprisal, where captives had inflicted injury n their captors, or had used treachery and violated the laws of war, where eleased prisoners have been taken a second time.[5] A man is not a prisoner ntil led "intra præsidia," but one who has surrendered before being brought here is not to be slain if he lays down his arms and does not attempt to scape. Voluntary surrender is a protection, and should always be accepted, nless there are urgent reasons to the contrary. Capitulation by the ommander, or by the majority of the forces, protects those who were pposed to submission.[6] Exchange of prisoners must be made equitably nd *bona fide*. Ransom ought not to be excessive. If a liberated prisoner ie before his ransom is paid, it is due from his heir.[7] When a prisoner is eleased on his promising not to take part in that war against his captors, uch promise is binding; but not necessarily so, if his undertaking is rejudicial to his State or contrary to military law. In the latter case jurists ommonly hold that the liberated prisoner ought to return to captivity.[8] A captive who regains his liberty has the right of *postliminium*.

Commanders-in-chief (or, in their absence, inferior officers) may enter nto military conventions, which are binding if they are within the limits f their powers and are ratified. Such powers are in general restricted o matters relating to military operations, and do not include that of establish- ng a definitive peace.[9] Truces may be made for the burial of the dead, which is demanded by natural and divine law and the universal consensus f humanity,[10] and for the exchange and liberation of prisoners. The nauthorised act of an individual does not amount to a breach of truce; ut the offender ought to be surrendered for punishment. During a truce orces are not to be surreptitiously advanced or withdrawn. Safe-conducts re based on good faith; violation by one side permits of similar retaliation

[1] II. 20. The directions to the Earl of Essex were more stringent: those seeking sylum in hospitals or churches could be captured, if they were "worthy to be taken as a risoner" (*State Papers, loc. cit.*).

[2] To the same effect writes Victoria.

[3] II. 19.

[4] II. 16, where he quotes Paulus (*Dig.* L. 17, 144: "Non omme, quod licet, onestum est").

[5] II. 18. [6] II. 17. [7] II. 15. [8] II. 11.

[9] II. 10; p. 172: "Quod igitur bellicum est, id duces tractent belli, non aliud."

[10] II. 24; p. 268; "Hoc est gentium et humanitatis ius,

by the other.[1] All these agreements and guarantees must be free from evasive intentions, verbal subtlety, captious interpretation, and everything else which is inconsistent with true *bona fides*.[2]

4. **Conclusion of War.**—The obligation imposed on belligerents to avoid excesses and observe "honestas" (honour, justice, humanity) is likewise applicable to the victor, when he has the conquered in his power. Generally the victor's conduct will depend on the seriousness of the injury received, the amount of damages suffered, the necessity of ensuring ultimate security. To go beyond such limits is unjust; for war is made not for its own sake, but with a view to attain peace—which may be defined as "concordia ordinata"[3]; and peace will be more likely to be durable if the conqueror acts in harmony with the law of nature, and observes the *ius gentium*, rather than merely relying on oaths and undertakings exacted from the conquered.[4] To inflict monstrous or cruel punishments, even under great provocation, is barbarism. Jurists have differed considerably as to the guiding principles to be observed; but Gentilis unhesitatingly affirms that *æquitas* is to be preferred to *ius strictum*, and *honestas* to *utilitas*.[5]

The vanquished party may be deprived of all weapons of war,[6] as well as of their standards, insignia, etc.[7] Their fortifications and, if necessity demand, their towns taken by storm may be destroyed,[8] and harbours "filled up."[9] Their temples and sacred objects must be spared, even though their religion is deemed false.[10] Works of art, libraries, manuscripts are inviolable.[11] If the various proceedings from the commencement to the termination of hostilities have been in conformity with law and justice, then the victor may enter into occupation of his opponent's territory.[12] But such occupation is in general to be effected only to the extent of the territory occupied by the forces, as the right is "particular" and not "universal" (which Hotoman also holds); it is a case of "adquisitio universalis" only when a State is entirely absorbed by another, and its

[1] II. 12-14.

[2] II. 4; pp. 136-7: "... Et valde respuunt scrupulosas interpretationes, disputationes de apicibus iuris, id est, de subtilitatibus; et ab omni malitia longe esse debent; et solam veritatem intueri, quam colit ius gentium, et post quam vadit, non autem post subtilitatem bona fides."

[3] III. 1. [4] III. 13.

[5] III. 12; pp. 335-7; p 338: "Integra iustitia est quæ honestatem rebus omnibus anteponit" (according to the opinion of Aristotle).

[6] III. 11; p. 334. [7] III. 6; p. 296. [8] III. 7; pp. 301-2. [9] III. 7.

[10] III. 6; p. 298: "Neque enim licet victoribus, perdere victis iura Dei aut naturæ. Etiam et quum est ea religio victi falsa, ut sic putet oxymore, parcere victo decet."

[11] In this respect, as in so many other questions, Gentilis is in advance of his time. Thus, in 1623, when Heidelberg was taken, its famous library was pillaged, and valuable manuscripts were carried off to the Vatican. Later it became the practice to stipulate that if a town capitulated, its charters, public documents, etc., were to be spared by the conqueror—as was the case in 1678 when Louis XIV. took Ghent.

[12] III. 4; p. 292.

rritory passes along with its rights and burdens.[1] The test of occupation effective possession, complete control.[2] If not otherwise laid down by treaty of peace, the lands, places, buildings, etc., as well as ships, arms, nd other booty are in the power of the occupier, and do not revert to ne original owners if the enemy is not expelled from the country.[3]

As to the person of the vanquished, Gentilis emphasises that it is nlawful to slay the prisoners or the heads of the army or of the defeated tate, in the absence of urgent reasons,[4] or retain them in captivity after eace is concluded. Certain rigours might perhaps be excused in the eat of a battle, but not so when the war is over.[5] Further, prisoners of ar may not be reduced to slavery, at least as between Christians.[6]

Other rights of the conqueror are—to change the form of the government f the conquered country, if demanded by reasons of general security,[7] to npose his religion (but only in the absence of any other)[8] and the language f his country.[9] Finally, he may justly exact a war indemnity,[10] impose a ibute and other pecuniary obligations, and demand such cessions of territory s he deems "pro arbitrio boni viri" indispensable to the security of his tate.[11]

5. **Maritime War.**—Apart from the rights and duties of belligerents in eneral warfare, a few questions are raised by Gentilis in regard to naval war. he granting of letters of marque—the recognised and usual practice of the ge—is emphatically condemned by him as amounting to a deliberate sanction f robbery of unarmed and harmless merchants and others: "Dico esse diosissimum hoc ius litterarum markæ quod merito divinissimus noster rex bominatur; per quod geretur latrocinium verius quam bellum contra inermes t innoxios mercatores et alios ab aciebus longe positos."[12] Jurists like ovarruvias and Ayala[13] had admitted the legitimacy of reprisals; and even rotius held that the goods of subjects may be seized in respect of any debt r unfulfilled obligation of their sovereign or State.[14]

[1] III. 5; p. 296: "Et civitas quæ de principe in principem transierit, censetur cum mnibus suis qualitatibus transiisse."

[2] III. 17; p. 370: "Is dicitur occupare, qui sic incipit occupare ut possit conservare possidere; qui autem nequit tenere, nisi capiat aliquem locum principalem, is occupasse on dicitur."

[3] III. 17; pp. 364, 367.

[4] III. 8; p. 313. Gentilis refers to the famous case of Conradin, who was defeated in 268 by Charles of Anjou, and, with Pope Clement's consent, was executed. Gentilis ays it was wrong to treat Conradin like a criminal when he was taken prisoner, but is death was demanded by supreme necessity. This precedent was cited by Elizabeth hen Mary's complicity in Babington's plot was detected in 1586.

[5] III. 8; p. 311: "Sed in bello licuit eos occidere inter iram vindictam et arma, non n pace."

[6] III. 9. [7] III. 10. [8] III. 11. [9] III. 11; p. 331.

[10] III. 3. [11] III. 4.

[12] His opinion given in a consultation, and to be found in *Lansdowne MSS.*, vol. cxxxix.

[13] *De iure et officiis bellicis et de disciplina militari* (1582), I. 4. 3

[14] *De iure belli et pacis*, III. 2. 2.

As to maritime capture, various doctrines were advanced by writers and different practices adopted by States. Some held that the property in a prize vested in the captor the moment it was taken; others insisted that in order that the property might pass, the prize must have remained in his hands for twenty-four hours[1]; others, again, amongst whom was Gentilis, argued that acquisition of property can follow only after "deductio intra præsidia."[2] The rule of twenty-four hours prevailed.[3]

6. **Neutrality.**[4]—In his treatment of the rights and duties of neutrals Gentilis lays down, as the indispensable criterion, the territorial principle. A belligerent has not, as was often claimed, an unrestricted and absolute right to pass over a neutral's territory. Innocent passage, however, is lawful; and it is the better practice to obtain permission from the State or sovereign in question, who is entitled to prohibit within his dominions any military operations whatever.[5] Foreign merchants remaining temporarily within the territory of a belligerent State cannot be treated as enemies by the other adversary, if they take no part in the war and faithfully observe the obligations imposed on neutrals. Hence they are free from all acts of war, including reprisals.[6] But if such merchants or other aliens have established a permanent residence there, and have taken over their fortunes, or the greater part thereof, with the intention of settling, then they may be justly identified with the enemy as occupying the position of subjects of their new country, even though they had not acquired the full rights of citizenship.[7] The test, then, is not origin or naturalisation—for one may be a citizen of various places—but domicile[8]; and this depends not only on the *factum*, but also, and more particularly, on the *animus manendi*[9]—though in a doubtful case domicile may be presumed from ten years' residence. Moreover, it is possible to have several domiciles.[10] From these considerations it follows that though the goods of domiciled persons may be taken, those of aliens proper must be respected (as was the case in the recent war between England and Spain), unless they actively assist the enemy.

In pursuance of the principle of territoriality, goods or prisoners taken within neutral territory do not pass to the captor, but must be delivered

[1] Cf. Grotius, III. 6. 3. n. 2.

[2] *Advocatio Hispanica*, I. 2; p. 4: ". . . quod res hosti capta non prius ei quæreretur, quam et intra eiusdem præsidia perducta esset, quamvis ea diu possessa esset, per duos amplius menses in mari habita." The *Siete Partidas* had admitted this principle, as well as that of *pernoctatio*.

[3] Cf. the article on Zouche, *loc cit.* p. 300, and that on Bynkershoek, *loc. cit.* p. 40.

[4] See the article on Bynkershoek, *loc. cit.* pp. 42 *seq.*

[5] *De iure belli*, I. 19; p. 83.—Bonet, *L'arbre des batailles*, had written to the same effect; but there were then no fixed rules on the subject.

[6] II. 22; p. 252: "Mercatoribus neque nocendum est; qui apud hostes deprehenduntur, etenim nec hostes isti sunt; ut nec alii peregrini. . . . Peregrinos neque represaliæ afflictant."

[7] *Ibid.* p. 253.

[8] *Ibid.* p. 258: "Subditi dicuntur non respectu originis, vel allectionis, sed domicilii."

[9] *Ibid.* p. 255.

[10] *Ibid.* p. 258.

up on the demand of the sovereign of that territory.[1] The same rule applies even if flight began where capture was lawful: for change of territory implies another sovereignty and another jurisdiction.[2] Hence in the war between France and Spain, Spanish fugitives pursued to England by the French were held to be protected; and similarly in 1588 when the Spaniards fled before the English fleet to the French coast.[3]

All neutrals who supply munitions of war and provisions to the enemy, and instigate or encourage him in any way, are deemed to have taken up his cause and to be therefore invested with hostile character. In general terms it may be stated that he is an enemy who does what pleases the enemy. There are no positive rules of *ius gentium* expressly forbidding the commercial relationship of neutral States with belligerents; but a general proclamation[4] or a special demand for the cessation thereof may be made by either adversary, in accordance with the principles of *æquitas* and *natura*. Freedom of trade and the rights of merchants are undoubtedly to be respected; but where there is a conflict between the interests of neutral traders and the supreme interests of a belligerent State, the latter must predominate.[5] Thus, recalls Gentilis, Elizabeth in 1589 rightly claimed that the English fleet lawfully despoiled the ships of the Hanseatic States for sending victuals, naval stores, and vessels to Spain.[6] (On this occasion, and again in 1597 at the request of Danish ambassadors, the English government drew up a list of contraband goods[7]; and in 1604 prohibited articles were enumerated in the treaty between James I. and Philip III. of Spain, and, again, later in the treaty between Sweden and the United Provinces.) Accordingly, the action of the English and others was illegitimate, says Gentilis, when they supplied munitions of war ("commoda bello") to the Turks, who were at war with the Emperor. For like reasons Charles of Burgundy adopted severe measures against foreign traders for attempting to carry provisions to his besieged enemy.

[1] *Advoc. Hisp.* I. 5.

[2] *Ibid.* I. 5; p. 16: "Alienum territorium securitatem præstat. Et mutato territorio mutatur potestas."

[3] Cf. *ibid.* I. 8, where he approves of the wide English claim to maritime jurisdiction.

[4] It had become customary as early as the thirteenth century to issue proclamations against the supply of munitions and provisions to the enemy.

[5] *De iure belli*, I. 21; p. 97: "Ius commerciorum æquum est; at hoc æquius tuendæ salutis. Est illud gentium ius; hoc naturæ est. Est illud privatorum; est hoc regnorum. Cedat igitur regno mercatura, homo naturæ, pecunia vitæ."

[6] Cf. *State Papers, Domestic, Eliz.*, ccxxii. 86, 89; ccxxiii. 64; ccxxv. 43.

[7] It may be interesting to refer to Burleigh's proclamation, where justification is sought on the grounds of civil law, the law of nations, natural and divine law: "Her Majesty thynketh and knoweth it by the rules of the law as well of nature as of men, and specially by the law civil, that whenever any doth directly help her enemy with succours of eny victell, armor, or any kynd of munition to enhable his shippes to maintain themselves, she may lawfully interrupt the same; and this agreeth with the law of God, the law of nature, the law of nations, and hath been in all tymes practised and in all countries betwyxt prynce and prynce, and country and country" (*Lansdowne MSS.* civ. 30, f. 70).

The guiding rule in all these questions may be expressed in the form of the universal imperative: "Quod tibi fieri non vis, alteri ne feceris."

Conclusion.—The work of Gentilis is of enduring value in the history of the law of nations. He did more than any other writer to free international law from the besetting theological importations and the incubus of scholastic casuistry. In his clear recognition of and constant insistence on the predominant positive aspects of the subject, he foreshadowed the modern prevailing view, which emphasises that the regulation of interstatal relationships is based on law and not merely on courtesy. He frequently appeals to divine law; he is always ready to invoke the authority of "natural reason," of the law of nature, but in doing so his aim is to apply additional sanctions to matters which are universally affirmed by the intuitive consciousness of mankind. Metaphysical abstractions and dialectic subtleties he avoided as being a menace to the stability of the very foundations of the subject. His aim is a thoroughly practical one; he considers with the mind of an impartial judge—a mind swayed by common sense rather than by ancient authority—the great controversies of the time; and, in default of prior agreement or consistent practice, he suggests brief definite solutions in accordance with the behests of justice and humanity. In comparison with the comprehensive work of Grotius, the work of Gentilis may seem more or less fragmentary; but it is important to remember that the work of the former was a later publication and had the great advantage of being modelled on that of the latter. No doubt Grotius is superior in philosophic grasp; by virtue of this capacity he elaborated a magnificent system, parts of which, however, were in some respects retrograde, in others alien to the requirements and circumstances of the age. Hence at times his work presents the appearance of an abstract *a priori* treatise. Gentilis, on the contrary, always considered actual conditions and possibilities, and never forgot that a body of rules governing the relationships between men or between States is necessarily of an organic nature; hence he avoids all arbitrary dogmatic methods. He clearly marked out the respective spheres of the international jurist and the theologian; he carefully differentiated between the work of the international lawyer and that of the civilian. He is not given to fallacious presumptions of analogy between the civil law and the law of nations—presumptions which govern the fundamental classification of the work of Grotius.

When we carefully weigh all these considerations, and bear in mind the differences of the epochs of these two jurists, the greater difficulties attending the pioneer work of the earlier writer, the remarkable systematic powers and enormous European influence of the later, we can readily conclude that Gentilis and Grotius are the two greatest contributors to international law; but, notwithstanding the glorification of the one by the Italian school and the perhaps overweening apotheosis of the other by the Dutch, we cannot finally decide which of them really occupies the foremost place.

IMMIGRATION RESTRICTION IN AUSTRALIA.

[*Contributed by* EVERARD DIGBY, ESQ.]

SINCE the passing of the Australian Immigration Restriction Act of 1901, the experience gained in its working has prompted amendments in the years 1905, 1908, and 1910. The determination to keep out the undesirable settler which inspired the original legislation has remained as keen during the ten years which have elapsed since the Act was first assented to as it was during the period that saw the Act shaped, and there is no sign of any slackening of its spirit. The lesson to be drawn from the colour question in America and South Africa has been well assimilated in Australia; the dread of results similar to what is seen in those countries has made Australians resolved to keep the Commonwealth for the white races, and there has been no hesitation shown in declaring that the so-called educational test is only a euphuism for the resolve to keep out the black and coloured races. As pointed out in this Journal (N.S., No. XVI. vol. vii. pt. 2, 1906, p. 591), the amending Acts in 1905 relating to immigration relaxed to a small extent the restrictions on likely immigrants, and eased the restraint on the admission of persons immigrating under contract. Since then there have been two further Amending Acts making more strict the rules governing immigration, and making it more difficult for undesirable aliens to come within the Commonwealth. By the Act No. 25 of 1908, s. 9 of the principal Act of 1901–5 is amended by the addition of certain sections providing for penalties to be inflicted on the bringing of stowaways into any port of Australia. The definition of "stowaway" will show the intent of this amending Act:

> Any person on board a vessel at the time of her arrival from any place outside Australia at any port in Australia who is not—(*a*) a *bona fide* passenger on the vessel, or (*b*) a member of the crew of the vessel whose name is on the articles, shall be deemed to be a stowaway, unless the master of the vessel gives notice to an officer that the person is on board the vessel, and does not permit him to land until the officer has had an opportunity of satisfying himself that the person is not a prohibited immigrant.

The nearness of Australia to China, and the large maritime trade done between Australia and the East, afford many and easy opportunities to Eastern aliens to evade the provisions of the Immigration Restriction Acts, and smuggle themselves or be smuggled into the Commonwealth. There

always has been a comparatively large section of Chinese in the population of Australia, so it may be expected that the Chinese are the aliens that require the closest watching. And it is mostly to meet this that the later amendments to the Act have been made. By Act of 1910, 1 Geo. V. No. 10, the running-string of the alien immigration net has been drawn tighter, and has made it more difficult for an undesired alien to enter the Commonwealth, and equally difficult for a person, if so desirous, of smuggling him in or aiding him to enter. Under the principal Act any immigrant might be required to pass the dictation test—the language test—within one year after he had entered the Commonwealth. This provided virtually for surveillance for twelve months. By s. 2 of the Act of 1910, this period of surveillance is extended to two years, thus giving an officer under the Act such great time in which he can hardly fail to ferret out any suspect.

From time to time inquiry has shown that, such is the lure of Australia to the Chinese, large sums are paid to persons in Chinese ports to arrange for and secure the emigration from China and the landing in Australia of Chinese desirous of evading the law governing immigration into the Commonwealth. In each case the sum is large, and no doubt has to be shared by the recipient among others. To check the effects of these large fees, and to deter attempts to evade the law, further provision was made in the Act of 1910 to restrict this undesired immigration. S. 5 provides that every person directly or indirectly concerned in surreptitiously bringing into the Commonwealth, or concealing or introducing, under circumstances which infer a secret introduction, into the Commonwealth of any immigrant shall be liable to a penalty of £100, or six months' imprisonment, or both. And as it has been shown that, owing to the difficulty of distinguishing between individual Chinese, false naturalisation papers and false certificates of birth have been frequently used, the Act provides a penalty of £100 or six months' imprisonment on any person who may use such false papers or makes any false representations in respect of the same.

Notwithstanding the watchfulness of the officers who administer the Act, the astuteness of the alien, and of the Chinese in particular, is such that an undesired immigrant often manages to slip from one place to another and remain in hiding for a considerable time. Section 8 of the Act, in order to strengthen the hands of the officers and to enable them to act immediately, if their suspicions are awakened, provides that any officer may stop and search any vessel or vehicle in which he suspects any prohibited immigrant to be; and also in the daytime to enter and search any building or place in which he may suspect such a prohibited immigrant to be. This latter power is certainly very great, and is greater than the power entrusted to a policeman in more serious circumstances. No warrant is necessary to enable an officer to ransack a man's house in search of an elusive Chinaman, who may possibly be a very peaceful man, and perhaps an

excellent cook anxious to find a kitchen in which to exercise his art. On the other hand a search warrant is required, and used only on the greatest care being taken on proof of its necessity, in order to enable a policeman to look into a man's house in pursuit of a counterfeiter's outfit, or of the valuable jewels missing from the Duchess of Dunstable's *écrin*. While awaiting a warrant, which is not always of rapid birth, the stolen property or the plant of the coiner may be placed beyond identification; the Chinaman cannot be broken up, melted down, or distributed, nor can his eyes be set horizontally in his face.

Turn we now from consideration of the actual machinery used to keep the black and coloured brethren of ours from Australian soil, and view the manner of using this machinery in certain instances. As it happens when a black or other undesirable immigrant is caught the question of domicil and nationality is often raised, suffice it that the principles of international law bearing on these points are the same in Australia as in England. Time and printer's ink need not be expended in comments on local cases before the High Court involving such points; but space may be spared to set out one or two cases in which the actual interpretation of the local Acts is contained. The bearing upon which the machinery turns is in truth the dictation test, by which the officer seeks to plumb the depth of the suspected immigrant's learning. The High Court judges have been very strict in the enforcement of a correct application of this provision. In *Potter* v. *Minahan*, 7 C.L.R. 277, an officer of Customs intending to put the dictation test to the defendant under s. 3 of the Act of 1901–5 told him he would read the passage slowly, and then, if the defendant said he could write it, he (the officer) would read it again slowly. S. 3 provides that persons described in succeeding paragraphs are prohibited immigrants: (*a*) "Any person who fails to pass the dictation test—that is to say, who, when an officer dictates to him not less than fifty words in any prescribed language, fails to write them out in that language in the presence of the officer." The officer then read the passage slowly, and the defendant said he could not write it; the passage was not read again, and the officer told the defendant he was a prohibited immigrant. Upon carrying the matter to the High Court, it was held that the dictation test had not been properly put so as to make the defendant a prohibited immigrant.

The case of *Chia Gee* v. *Martin*, *Chow Quin* v. *Martin*, 3 C.L.R. 649, decided at an early period, settled several points:

1. It is for the officer, and not the immigrant, to select the European language for applying the dictation test.

2. Where prohibited immigrants were taken ashore under arrest as stowaways it was no defence to a subsequent prosecution of them, as prohibited immigrants, that they were brought ashore in the custody of the law.

3. It is not necessary to prove that a person intends to remain in the

Commonwealth for any definite period in order to prove him a prohibited immigrant.

4. Under the principal Act 1901–5 a person previously domiciled in the Commonwealth might be convicted of being a prohibited immigrant if he did not satisfy the officer as to his previous domicil.

5. When a person is prosecuted as a political immigrant, the test whether a previous dismissal is a bar to further prosecution is whether the evidence necessary to support the second prosecution would have been sufficient to procure a legal conviction on the first.

S. 3 (*k*) of the principal Act 1901-5 provides for the muster of the crews of mercantile vessels before leaving port, and declares that if any member thereof is then absent, and is in the opinion of the officer a prohibited immigrant, such member shall be considered a prohibited immigrant. There is a proviso allowing every crew to land subject to the final muster and its consequences. S. 9 of the same Act provides that the masters, owners, agents, and charterers of any vessel from which a prohibited immigrant shall escape shall be liable to a prosecution jointly and severally and to a penalty of £100. In *Ex parte Gordon*, 3 C.L.R. 724, it appeared that a member of a crew was absent on final muster, and the master was convicted and fined. On an application for a prohibition, the High Court held that—

1. The proviso in s. 3 (*k*) was intended to apply to a prosecution under s. 9, whether it does or does not apply to a prosecution against the immigrant himself, and that, in the absence of evidence to the contrary, the magistrate was bound to find that the absent member of the crew was a prohibited immigrant who had entered the Commonwealth contrary to the Act, and the conviction was right.

2. The officer having applied his mind to a relevant question—viz. Was the person in question one who would, if called upon, fail to pass the dictation rest?—his opinion could not be questioned in a prosecution founded on that opinion.

The provisions of s. 9 of the Act 1901-5 are not in conflict with the Imperial Merchant Shipping Act.

Although at the beginning of these comments it was declared that the law of domicil and nationality would be kept sacred from comment, this paper may be wound up with a *semble* from *A.G. for the Commonwealth* v. *Ah Sheung*, 4 C.L.R. 949, to the effect that there is no Australian nationality as distinguished from British nationality so as to limit the power of the Commonwealth under s. 51 of the Constitution to exclude persons from Australia.

THE STATUS OF BRITISH COMPANIES IN EGYPT.

[*Contributed by* Sir Malcolm McIlwraith.]

The Report of the Judicial Adviser contains, among many other matters of interest, a most valuable commentary on the situation created in Egypt by the attitude of the Mixed Courts towards British Companies.

By far [he says] the most important question of private international law which has come before the Mixed Tribunals in recent times relates to the situation of foreign commercial companies in Egypt. This question has given rise, not only to much divergence of opinion among lawyers, as well as to a good deal of controversial correspondence in the newspapers, but also to a conflict of jurisdiction with a Consular Court. Though this is by no means an unusual event in a country which is endowed, by law and treaties, with no less than five separate orders of Tribunals—all mutually independent of each other—yet, occurring, as it does, in respect of a question which nearly touches the material interests of a numerous portion of the community, more especially the British community, it may be worth while to endeavour to state the problem as it appears to the writer, and note the main arguments of both sides in this controversy.

The facts are as follows. The Helouan Development Company, Limited, an English joint-stock enterprise, registered in England under the Company Acts, after some eighteen months of existence, decided to go into voluntary liquidation, and two liquidators were appointed (one being an Englishman and one a foreigner). Shortly afterwards, a shareholder of Egyptian nationality brought an action against the company in the Cairo Mixed Tribunal, asking that the company be declared null and void, as having been formed illegally, and under conditions which amounted to a fraud on Egyptian law. The Mixed Tribunal, by a judgment of May 29, 1909, granted this petition, made an order declaring the said company null and void in Egypt, and appointed three other liquidators to proceed to the judicial liquidation of its assets. These judicial liquidators thereupon applied to the voluntary liquidators to hand over to them the books and assets of the company. On this, a British shareholder applied to the British Consular judge for an injunction to restrain the British liquidator appointed by the company from parting with these books and other property. The

Consular judge held that the Mixed Tribunals had no jurisdiction to annul a British company, incorporated under British law, and he therefore granted the injunction asked for.

Now, for a clear appreciation of the crux of this controversy it is necessary to revert to the very important judgment of the Mixed Court of Appeal of April 29, 1908 (B.L.J., xx. p. 221), which annulled another British company—the City and Agricultural Lands of Egypt, Limited—because the recent judgment of the Lower Court, annulling the Helouan Development Company, was merely an application to a particular case of the general principles laid down in the judgment of the Court of Appeal. Before, however, discussing the questions of law involved in that judgment, it is material to recall the circumstances under which these questions first presented themselves for decision in the law courts.

These were as follows: Under Egyptian law, Egyptian joint-stock enterprises can only be incorporated by a Khedivial Decree (Art. 46 of the Mixed Code of Commerce and Art. 40 of the Native Code of Commerce), and therefore the Government, which has thus the power of granting or refusing incorporation, is in a position to regulate the conditions under which it will, or will not, accede to such applications. This it has done by several sets of Regulations (Decisions of the Council of Ministers of April 17, 1899, and June 3, 1906). During the great wave of prosperity—or, at any rate, of great speculative activity, generally known as "the boom," which swept over the country in the years 1905-7—a very large number of such Egyptian companies were floated, and one of the principal elements in the flotation by the promoters was the system of founders' shares. The device was as follows: The interested parties spread the rumour that the company about to be launched on the market had an exceptionally brilliant future before it, and that the founders' shares would almost immediately become exceedingly valuable. They, of course, retained for themselves the bulk of these founders' shares, allotting a small quantity to the applicants for ordinary shares, in proportion to their applications. By manipulating the market, they usually succeeded in "unloading" their founders' shares at very high prices, and thereafter held no further stake whatever in the enterprise, and consequently had no interest in its prosperity. Needless to say, the ordinary shares—once the artificial support of the promoters was withdrawn—declined rapidly in value, whereupon the few founders' shares in the hands of the public, in view of which it had mainly been induced to subscribe for ordinary shares, usually became unsaleable; whilst the promoters, who had contributed nothing, or next to nothing, to the assets of the company, pocketed large profits. It is said that one of the most successful of the local financiers was enabled to launch in this manner no less than four companies in a fortnight, and made a large profit out of each of them. All the foregoing is, no doubt, very elementary to the initiated, but it is a necessary explanation for those unfamiliar with the art of company promotion.

In order to put a stop to these abuses, the Government declared, by Decision of the Council of Ministers of June 3, 1906, that it would decline in future to authorise the incorporation of any company whose articles provided for the creation of founders' shares (*parts de fondateurs*), unless such shares constituted the remuneration for the contribution (*apport*) of a patent, or a Government concession, the pecuniary value of which it was impossible to estimate.

The Government was powerless to legislate for the repression of the reprehensible practices in question. All it could do was to safeguard its own responsibility by declining to countenance *Egyptian* companies formed under vicious conditions, which would be likely to cause loss to gullible investors. The decisions manifestly left untouched companies formed abroad under foreign legislation. The inevitable result, which was of course foreseen, but could not be prevented, then ensued. Unscrupulous promoters, desirous of evading the stringent conditions imposed by the Egyptian legislator, had recourse to foreign countries for the formation of their enterprises, notably to England, whose legislation in the matter of joint-stock companies offers exceptional facilities.

Enterprises, therefore, whose business was mainly, if not exclusively, concentrated in Egypt—in a large number of cases enterprises whose sole business related to the buying and selling of land in Egypt—were thus formed in the guise of British joint-stock companies, and this in spite of the fact that it appears to result from the English cases that in England "in order to be capable of being registered under the Act, the company must be one which at the outset contemplates some description of management *and of carrying on business in this country*"—*i.e.* in England (see Buckley on the Companies Acts, 7th ed. p. 9, and cases there cited.)[1]

The company's business being in Egypt, it was natural to establish in Egypt most, if not all, of its machinery. Thus in many cases the Board of Directors sat in Egypt and not in England, the shareholders' meetings were held here, and so forth. In England there only remained some semblance and shadow of the administration, such as an office and a secretary, the substance being concentrated here. It is clear that the status of such companies was, to say the least of it, abnormal.

However, as long as the period of illusory prosperity lasted, and bull speculation remained in the ascendant, these companies continued—in appearance, at any rate—to flourish. When, however, the inevitable reaction arrived, and the unpaid capital was called up, numbers of shareholders who had only subscribed in order to pass on their shares at a profit found themselves in great embarrassments.

The shareholders of the companies became nervous, and naturally cast

[1] "Whether or not a company can be registered in this country, which conducts no business whatever and never intends to conduct any business in this country, *quære*" (Buckley, *loc. cit.*).

about for some means of minimising their impending losses. The obvious resource was to set up the illegality of companies formed under such conditions as have been indicated above, and this was the course taken in the case of the City and Agricultural Lands of Egypt.

Such being the circumstances under which the Court of Appeal was called upon to pronounce upon the legality, or otherwise, in Egyptian law, of the company in question—circumstances which are material, not to prejudice the issue, but to test the genuineness of the English form adopted by these companies—it will be convenient, before relating the decision at which it arrived, to take a survey of the principles recognised in other countries with regard to the criterion of the nationality of joint-stock companies (or *sociétés anonymes* as they are called in French and Egyptian law) and the rights they enjoy in foreign countries.

This is the more material that, in dealing with the Mixed Tribunals and their decisions, it always has to be borne in mind that, recruited as they are from all the principal countries of Europe, and having a very fragmentary law of their own to administer, they are naturally prone, and often compelled, to fall back on the principles and provisions in force in their own countries, and more particularly in those countries whose law is analogous[1] to the Mixed Tribunal Codes.

The problem which the Court of Appeal had to consider appears to resolve itself into two main questions, viz.:

1. What is in Egypt a foreign country, and what are its rights?
2. What Court has, in Egypt, jurisdiction[2] to determine these questions?

The decision of the question, "What is a foreign company?" obviously involves a consideration of the principles which govern the nationality of companies. The importance of the question is manifest, because on the nationality depends the law according to which the company must be formed, by which its corporate activity must be regulated, and eventually its dissolution effected. Yet the determination of this nationality is unfortunately one of the most vexed questions of private international law and jurisprudence[3] in most European countries. There have been successively proposed, as the proper criterion, the place where the articles of association are drawn up, the nationality of the founders, the place where the shares are issued, and several other standards.

[1] This is particularly the case as regards companies, the provisions concerning which, in the Mixed Codes, bear a very strong resemblance to those of the French, Italian, and Belgian laws.

[2] It is usually more logical to deal with the jurisdiction first and the merits afterwards. But, in this case, the jurisdiction depends on the view taken of the merits, and it will therefore be convenient to reverse the usual order of discussion.

[3] See, *e.g.*, Lyon-Caen and Renault, *Traité de droit commercial*, vol. ii. 2nd ed. p. 821 *seq.*; Houpin, *Traité général des sociétés civiles et commerciales*, vol. ii. p. 158 *seq.*; André Weiss, *Traité théorique et pratique de droit international privé*, 2nd ed. vol. ii. p. 477 *seq.*; E. Thaller, *Traité élémentaire de droit commercial*, 3rd ed. p. 403 *seq.*

At present, however, there seems to be a general consensus of opinion among continental jurists in favour of the domicile of the company. But there is a divergence of view again as to whether such domicile means the place where the working of the company is concentrated, *i.e.* its principal sphere of activity (*centre d'exploitation*), or the place where its head office is established (*siège social*). Some countries have very sensibly settled the question once for all by a legislative text (Belgium, Italy, Roumania).[1] But in most countries it is left to the Courts to determine, and the point is accordingly still the subject of acute controversy.[2]

In England the question of the nationality of joint-stock companies does not appear to arise, doubtless because, in the case of any company registered in England, the certificate of registration is conclusive proof of incorporation. Nor can I find any reported case in which any question as to the nationality of a company, which is to all intents and purposes English, but which has been registered abroad for the purpose of evading the English Company Law, has been raised in the law courts. There is, however, the very analogous question of the domicile or residence of joint-stock companies, which frequently arises in revenue matters, where liability for income-tax is involved. And on this question the English Courts appear to have long ago laid down very similar principles to those enunciated by French jurisprudence and Belgian and Italian law. See, *e.g.*, Nelson, *Private International Law*, p. 228, and the cases there cited: "A trading corporation is considered to have its principal residence where its substantial business, not the form or shadow of business but the real trade and business is carried on." See *Attorney-General* v. *Alexander*, L.R. 10 Exch. 20; *Cesena Sulphur Company* v. *Nicholson*, *Calcutta Jute Mills* v. *same*, 1 Exch. D. 428; and *Alexandria Water Company* v. *Musgrave*, 1883, 2 Q.B.D. 174 C.A. In the comparatively recent case of *De Beers Consolidated Mines, Ltd.*, v. *Howe*, C.A. (1905), 2 K.B. 612, it was held that the company "resided" where the principal board of directors sat and the most important decisions were taken, and not where the head office was situated and the actual working operations of the company were, in fact, carried on.

[1] See Belgian Law of May 18, 1873, modified by the Law of May 22, 1886, Art. 129: "Toute société dont le principal établissement est en Belgique est soumise à la loi Belge, bien que l'acte constitutif ait été passé en pays étranger." Cf. also the Italian law, Art. 230, § 4, of the Code of Commerce: "Le società costituite in paese estero, le quali hanno nel Regno la loro sede e l'oggetto principale della loro impresa, sono considerate come società nazionali e sono soggette, anche per la forma e validità del loro atto costitutivo, benchè stipulato in paese estero, a tutte le disposizioni del presente codice." See also Roumanian Code of Commerce, Art. 239.

[2] "Nationalité des personnes morales," by P. Arminjon, *Revue de droit international et de législation comparée*, 34e année, 1902, pp. 424 *seq.*; "De la nationalité et de la dénationalisation en France des sociétés par actions," by H. Lavollée, and "Du changement de nationalité des sociétés," par R. Demogue, in the *Documents du Congrès juridique international des sociétés par actions*, Brussels, 1910, vol. i.

In the case of a company registered in England, but which has been declared by the Courts of the country where its business is carried on to be irregularly constituted and therefore null and void, the English Courts would appear to have jurisdiction to grant a winding-up order, and would probably do so if applied to, on the ground that under the circumstances it would be "just and equitable" to do so. See s. 129 of the Companies Consolidation Act, 1908 [1] (*Reuss* v. *Bos*, 5 H.L. 176).

Next as to the rights of companies admitted to be "foreign." Assuming the company to have been legally constituted according to the law by which its constitution is governed, it is generally admitted nowadays that it may carry on business abroad with considerable freedom, subject to obligations, when it establishes foreign branches similar to those imposed on local companies. In some countries, however, an authorisation is required—either collectively or individually—in some form, such as by treaty, law, decree (France, Russia, Austria).

But when a company which is, in reality, a national company, is formed abroad, and adopts the disguise of a foreign company, solely or mainly in order to evade the prescriptions of its national law, continental jurisprudence does not hesitate to declare such a company null and void.[2]

After this brief survey of the principles in force in other countries as to the nationality of commercial companies and their rights in foreign lands, and after having recalled the circumstances under which the courts of law here were called upon to deal with the question, let us now see how it presented itself in Egypt from a legal point of view.

In Egypt foreign companies have, ever since the institution of the Mixed Tribunals, enjoyed the fullest liberty to carry on their business in Egypt, subject only, as regards their constitution, working and dissolution, to a due observance of the law of their nationality. This usage is so well established that it may now be regarded as having the force of law. The situation of foreign companies in Turkey [3] is the same. With regard to Egyptian companies, the subject is very briefly and inadequately dealt with by the Mixed Civil and Commercial Codes, and for this reason, indeed, their provisions have been completed by the rules laid down in the two decisions of the Council of Ministers before referred to. The fundamental provisions of the law on the subject are, however, to

[1] "A company may be wound up by the Court . . . (vi) if the Court is of opinion that it is just and equitable that the company should be wound up." For instance, if the company is engaged in an illegal business. Cf. *In re International Securities Corporation* (1907), 25 T.L.R. 31.

[2] Conseil Fédéral Suisse, 21 January 1875 (*Journal du droit international privé*, 1875, p. 307); Cour de Gand, 21 April, 1876 (*Pasicrisie*, 1876, ii. p. 251); Cassation France, 22 December 1896 (*Journal du droit international privé*, 1897, p. 364); Trib. Comm. de la Seine, 26 August 1902 (*Journal du droit international privé*, 1904, p. 189).

[3] See "Des sociétés étrangères en Turquie," *Journal du droit international privé*, 1908, p. 1002.

be found in Arts. 46 and 47 of the Mixed Commercial Code,[1] which are as follows:

46. La société anonyme ne peut exister qu'en vertu d'un firman du Khédive qui approuve les conditions contenues dans l'acte de société, et qui autorise son installation.

47. Les sociétés anonymes qui se fonderont en Egypte seront toutes de nationalité égyptienne et devront y avoir leur principal siège social.

In Egypt, therefore, the place where the company is formed, combined with the place of its domicile, determines the nationality of the company, and the judgment of the Court of Appeal of April 29, 1908, which, reversing a decision of the Alexandria Tribunal, annulled the City and Agricultural Lands of Egypt, explains the meaning to be attached to the expression "formation" of the company in the following terms: "Fonder une société veut dire la constituer en s'associant pour signer l'acte qui détermine ses cases et les conditions de son fonctionnement, en vue d'obtenir l'autorisation nécessaire et en souscrivant les capitaux." In short, the theory of the judgment may be very briefly summarised as follows:

Under Arts. 46 and 47 of the Code of Commerce joint-stock companies formed in Egypt are of Egyptian nationality, and must have their principal establishment in that country. If therefore they are, in fact, "formed in Egypt," they must be formed in conformity with Egyptian law in order to be considered as joint-stock companies in Egypt. Consequently the mere formality of a foreign incorporation is powerless to affect their Egyptian nationality. It follows that, being in reality Egyptian and not foreign companies, and not being incorporated in conformity with Egyptian law, they are necessarily null and void.

Having thus endeavoured to explain the nature of the problem of what is, in Egypt, and what is not a "foreign company," and the principle on which it has been solved in the Mixed Court, it remains to consider the no less important question—which has given rise to the main controversy and has led to a direct conflict with the British Consular Court—viz. "Have the Mixed Tribunals jurisdiction to determine these questions as regards British companies in Egypt?"

The main contention of those who disapprove of the doctrine of the Court of Appeal, and uphold the view of the British Consular judge, is that companies, like individuals, have their personal status, which can only be affected by decisions of their own national Courts and no others. Particularly, as regards British companies, it is strongly urged that the fact of their incorporation, in England, confers upon them *ipso facto* British nationality, of which no foreign Court could deprive them. It is further argued that the Capitulations prevent a company validly constituted in a foreign country

[1] These provisions, forming part of the Codes of the Mixed Tribunals approved by the Powers, are obviously obligatory for them.

which enjoys Capitulations with the Porte from being declared null and void in Egypt.

To this the partisans of the Mixed Court judgment reply that no doubt the incorporation of a company in England confers, in England, British nationality on the company incorporated *ipso facto*. But they ask, with considerable force—Is not this mere question-begging or arguing in a circle? The whole question at issue here is whether the British incorporation is conclusive in Egypt, when the rights of British companies come into collision with those of Egyptians and foreigners of different nationalities, thus founding the jurisdiction of the Egyptian Mixed Tribunals administering Egyptian Mixed Law. Of course, if this is a question of "personal status"—as has been declared—the matter is concluded. But is this really so? No one denies that joint-stock companies are "moral persons," *i.e.* corporations, and, as such, have a personal status like individuals. But all commercial corporations, or nearly all, are primarily creatures of contract, and the validity of the contract to which they owe their origin depends upon the due observance of Egyptian law—if they are, in reality, Egyptian—no less than it depends on their national law if they are foreign.

That such questions are, *par excellence*, of a contractual and not of a personal character was evidently the view of the Egyptian legislator, for he has placed all the provisions concerning native commercial companies in the Egyptian Native Code of Commerce, to be dealt with therefore by the Native Tribunals, according to the secular law, and not by the Cadis, who are the judges in matters of personal statute.

Again, as regards the Capitulation argument, nobody contests the principle that foreign companies, validly constituted under the law by which that constitution must be governed, are entitled to be recognised as legally existent, and to enjoy the rights which may result from such existence in Egypt. But, as before observed, the whole question is—What *is* a foreign company in the eyes of Egyptian law, and is it sufficient that its founders should have given it a foreign dress to withdraw it from the jurisdiction of the local Courts? It is clear, at any rate, that under existing conditions no other Courts in Egypt, except the Mixed Tribunals, can have jurisdiction to decide whether a commercial company is Egyptian or foreign, when the rights of third parties of different nationalities are involved. And such rights are involved in practically every joint-stock company founded nowadays in Egypt. If, then, the Mixed Courts are competent to decide the question of nationality, it seems difficult to refuse them the right to annul such companies as they find to be in fact Egyptian, and to have merely assumed the garb of a foreign company in order to evade the provisions of Egyptian law.

French Courts, at any rate, as we have seen, do not hesitate to proceed in this fashion towards foreign companies, and in the case of *La Construction* (Cass. December 22, 1896, see note i. p. 26) they annulled a so-called

"British" company which they found to be, in reality, French, formed in England, in the English form, merely in order to evade the stringent provisions of the French Company Law of 1867. And the Mixed Tribunals are accustomed to hold that their jurisdiction is as full as that of National Courts in respect of all rights of foreigners of different nationalities in Egypt not expressly excluded from their competence.

Finally, it is to be observed that there would appear to be little danger of an abusive exercise of this jurisdiction, for the Court of Appeal was careful to lay down clearly in its judgment that "il ne peut être question de contester à une société anonyme véritablement étrangère le droit d'être reconnue en Egypte comme personnalité juridique, d'y ester en justice et d'y exercer son commerce ou son industrie, soit directement, soit au moyen de succursales établies dans le pays."

Probably the root of much misunderstanding in this controversy is the different view taken by English and Continental lawyers of the nature of joint-stock companies.[1] In English law, incorporation alone confers nationality and confers it conclusively. In French law, and that of the countries whose law is founded on the French system, nationality results from a number of different circumstances which it is not within the power of the founders to vary at their pleasure. English law, in short, permits the widest freedom in such matters. Continental law, on the other hand, regards all that relates to companies as questions of public policy, and consequently regulates them with the utmost stringency.

In conclusion, it may be pointed out that, whatever view be taken of this controversy—and it is not the only one which has arisen of late between the Mixed Tribunals and the British Consular Court[2]—it seems to point very clearly once more to the need for some Superior Commission or Court of Conflicts with power to decide authoritatively which Courts are competent, when conflicts of jurisdiction arise between separate orders of Tribunals in civil and commercial cases. The law has already provided for such a Tribunal when the conflict arises in criminal matters between the Mixed

[1] See as to this an interesting article by Mr. F. R. Sanderson entitled, "Foreign Companies in Egypt," *Juridical Review*, April 1909.

[2] The other related to a claim by the Mixed Tribunals to seize, on behalf of a Mixed Tribunal judgment holder, certain goods belonging to a British subject which had already been seized by the British Consular Court, at the suit of a British creditor. The Consul objected, on the ground that the goods were already in the possession of his Court, placed under his consular seal, and no longer liable to be seized by any other Court. The Mixed Tribunal replied that being merely seized and not sold, and a "Mixed interest" having arisen through the claim of a foreigner, the matter was taken out of the jurisdiction of the Consular Court, and brought within that of the Mixed Tribunal, the only Court in Egypt having jurisdiction over foreigners of different nationalities, and to which accordingly the goods, or the proceeds of sale, should be handed over, the claims of the respective execution creditors to be thereafter adjudicated on by the latter Court. It was further alleged that this was the common practice in the other Consulates. The dispute has not yet been finally disposed of.

Tribunals and the Consulates,[1] but has unfortunately omitted to regulate those which occur in civil and commercial questions.[2] I discussed the whole subject of conflicts many years ago,[3] at considerable length, and gave typical examples of those which occur, not only between the Mixed Tribunals and the Consulates, but also between the former and the Native Courts, between the Native Courts and the Mehkemehs, between the Mehkemehs and the Patriarchates, and even between the different Patriarchates themselves. It would be tedious to repeat what was said at that time, but it must be admitted that the experience since gained, in the course of the last nine years, as to the almost insuperable difficulties placed, under present conditions, in the way of organic legislation of any kind,[4] is not of a nature to encourage the Government to anticipate the speedy institution of such a Tribunal of Conflicts as would be desirable, or to propose to the Powers—as it has been urged to do by some optimistic reformers—a brand-new, complete, and up-to-date Company Law,[5] one of the most intricate and controversial subjects in the whole field of legislation.

[1] See R. O. J. Arts. 22-5, Title II. See also the very interesting discussion on this subject in the International Commission of 1890 (Procès-verbal No. 4, sitting of April 8). On the question "Y a-t-il lieu d'instituer un Conseil ou Tribunal à l'arbitrage duquel seraient soumis les conflits entre la Juridiction Consulaire et les Tribunaux Mixtes, *en matière Civile et Commerciale?* ce Conseil des conflits existant déjà pour la matière pénale," the representatives of Germany, Belgium, Denmark, Great Britain, and Egypt voted for the affirmative. But the majority was against the proposal.

[2] This omission is sometimes adduced as proof that the legislator did not admit the possibility of such conflicts in these matters, the judgments of the Mixed Tribunals being necessarily supreme, especially having regard to the terms of Art. 18, Title II. R.O.J. It is doubtful whether this article bears the construction put upon it, and in other respects the argument would carry more weight if there were fewer admitted omissions in the Mixed Tribunal legislation. Moreover, the discussion recalled above proves that the question is debatable.

[3] See Report for 1901, p. 43.

[4] Cf., for instance, the fate of the project for the amalgamation of the Registry Offices (*Bureau unique*), which has been under the consideration of the Powers since 1905.

[5] Such a law, in order to solve questions like the present one, would obviously have to deal with the situation of foreign companies. A French project on this difficult subject was submitted to the Chamber of Deputies in 1902, and has not yet emerged from the Committee stage.

THE LEGAL INTERPRETATION OF THE CONSTITUTION OF THE COMMONWEALTH.

[*Contributed by* A. Berriedale Keith, Esq., D.C.L.]

PART II.

The Immunity of Instrumentalities.—The principle of the immunity of Commonwealth agencies was first enunciated in the case of *D'Emden v. Pedder*[1] decided in February 1904 by the full Court, which was then constituted of the Chief Justice (Sir S. Griffith), Sir E. Barton, and Mr. O'Connor. The question they were deciding was the validity of the prescription of a Tasmanian Act (2 Ed. VII. No. 30), which laid down that in respect of receipts where the sum received amounted to £5 but was under £50 the duty of 2*d.* was payable, so far as it applied to a receipt given by a Commonwealth officer in Tasmania for his salary, such receipt being required to be given by the Commonwealth law and practice regulating the department to which the officer belonged. It was held by the Supreme Court of Tasmania, to which the case of D'Emden, an officer in the public service of the Commonwealth, was carried from the Court of Petty Sessions in Hobart, that the Tasmanian Act did apply to D'Emden, whose conviction by the Petty Sessions for not stamping the receipt which he gave for his salary for the month of March 1903 was therefore upheld. The case was carried to the High Court of the Commonwealth, before which it was contended by the Attorney-General of the Commonwealth that the officer was a federal agent, that the tax proposed to be imposed upon the receipt was a tax upon an agency of the Commonwealth, and was therefore by necessary implication forbidden by the Constitution. Other pleas were submitted, but they were not seriously considered by the Court, and the real stress of the case rested on the doctrine of the immunity of federal agencies. It was argued that the American cases which had established for the United States the principle of the immunity of federal agencies were proper to be followed by the High Court of the Commonwealth, and particular stress was laid upon the case of *McCulloch* v. *The State of Maryland*,[2] in which the principle was laid down by Chief Justice Marshall. In the course of the judgment of the Court the Chief Justice stated: "In considering the respective powers of the Commonwealth and of the States

[1] 1 C.L.R. 91. [2] 4 Wheat. 316.

it is essential to bear in mind that each is, within the ambit of its authority, a sovereign State subject only to the restrictions imposed by the Imperial connection and to the provisions of the Constitution, either expressed or necessarily implied." He proceeded to argue that where any power was granted to the Commonwealth there was included in the grant, to the full extent of the capacity of the grantor and without special mention, every power and every control the denial of which would render the grant itself ineffective. He pointed out that this was supported by the wording of the Constitution, s. 51 of which gave the Parliament power to make laws for the peace, order, and good government of the Commonwealth, terms which had been interpreted by the Privy Council to confer upon legislatures within the territory subject to their jurisdiction sovereign authority, absolute and uncontrolled, except so far as it was restricted by the Constitution itself. It was true that the States had similar powers reserved to them, but the possibility of conflicting legislation was removed by s. 109 of the Constitution, which provided that a law of the Commonwealth should prevail over a conflicting provision in a State law. With respect, however, to matters within the exclusive competence of the federal Parliament no question of conflict would arise on its validity, but "when a State attempts to give to its legislative or executive authority an operation which if valid would fetter control or interfere with the free exercise of the legislative or executive power of the Commonwealth, the attempt unless expressly authorised by the Constitution is to that extent invalid and inoperative. And this appears to be the true test to be applied in determining the validity of the State laws and their applicability to federal transactions."

The Chief Justice proceeded to accept the doctrine laid down by the United States Courts, which he regarded as exactly applicable to the case. He pointed out that the Constitution was framed by a convention of representatives, of whom some if not all were familiar not only with the Constitution of the United States but with that of the Canadian Dominion.[1] "When therefore under these circumstances we find embodied in the Constitution provisions undistinguishable in substance, though varied in form, from provisions of the Constitution of the United States which had long since been judicially interpreted by the Supreme Court of that Republic, it is not an unreasonable inference that its framers intended that like provisions should receive like interpretation." The Court held therefore that taxation by the State cannot apply to an instrument of the Commonwealth. It was pointed out that the doctrine laid down in the McCulloch case had been adopted and followed in the interpretation of the Constitution of the Dominion of Canada by the Courts of the Province of Ontario and New Brunswick since the year 1878, and that their decision, though always adverse to the provincial governments, had not been made the subject

[1] Cf. also 4 C.L.R. 1087, at p. 1109 *seq.*

appeal either to the Judicial Committee or to the Supreme Court of anada.

The Court rejected the argument that the principles enunciated in the IcCulloch case were inapplicable to the Commonwealth by reason of e power of veto reserved to the Crown by the Constitution. It was no art of the function of the executive government to determine the validity an attempted exercise of legislative power, and even if such a duty were st upon the executive government it could neither relieve the judiciary their duty to interpret nor affect the principles to be applied in that terpretation. Nor was it valid to argue that the question was whether e attempted exercise of State authority actually interfered with the erations of the federal government: the point was whether the State w affected the federal instrumentality, not whether it really interfered ith its operation. The Court held therefore that the Tasmanian Act as not intended to apply to federal officers, and they allowed the appeal D'Emden.

The same principle was raised in a more important series of cases, *eakin* v. *Webb* and *Lyne* v. *Webb*,[1] which raised the question whether e Income Tax Acts of Victoria could be held to apply to the salaries a Minister of the Crown for the Commonwealth and of a member of e Commonwealth Parliament. It had been held by the full Court of ictoria that both Mr. Deakin and Sir W. Lyne were liable to income x in respect of the portions of the sums which they had earned in Victoria, llowing the previous decision in *Wollaston's Case*.[2] This decision the igh Court of the Commonwealth rejected, following the previous decision the case of *D'Emden* v. *Pedder*.[3] The argument for the decision which ad been arrived at by the Court of Victoria was based on the ground at the States themselves and their Constitutions as regards legislative and xecutive powers were not affected by the Commonwealth except in so far the Commonwealth Parliament and Executive were given definite powers. ress was laid in Mr. Isaacs's argument for the respondent on the difference etween the constitutions of the Commonwealth and the United States, ad it was pointed out that the Privy Council had consistently declined to terpret the Canadian Constitution in the way in which the United States onstitution was interpreted, and the fact that in Canada the power of dis-llowance of provincial Acts was vested in the Governor-General in Council, ot in the Crown, did not affect the principle. It is important to note at the argument which is precisely in accordance with the later judicial terances of Mr. Isaacs admits the possibility of interference by the Court any State Act should really interfere with a Commonwealth instrumentality, ut it pointed out that the power of disallowance would normally prevent ny such eventuality. The High Court declined to accept the argument, nd carefully reviewed the apparent discrepancy between their views and

[1] 1 C.L.R. 585. [2] 28 V.L.R. 357. [3] 1 C.L.R. 91.

those of the Privy Council as applied to the case of Canada in *Bank of Toronto* v. *Lambe*.[1] In that case the provincial right of direct taxation was held to be valid despite the argument that the tax might be used to render ineffectual the power to conduct business in the provinces conferred upon the bank by the Act of the Dominion Legislature. The High Court considered that that case was not parallel with the case under discussion: they thought that the basis of the decision in that case was that so express a power of taxation was given to the provinces that it could not be affected by any argument from implied reservations. But the principle which they applied to the construction of the Commonwealth Constitution was that[2] when an alleged power was not expressly conferred but the question of the existence of the power or the limits of its exercise was a matter of inference and of implication depending upon a consideration of the whole of an instrument dealing with the relations of the several parts of a federated State the possibility that the power if existent or unlimited might be exercised to the destruction or the impairment of the efficiency of the instruments of the central government was relevant in considering whether upon the construction of the whole instrument the power was intended to be conferred, whether absolutely or with limitations.

The Court, however, also admitted that the Privy Council seem to have had in mind the fact that the provincial Acts were subject to disallowance by the Governor-General as one reason for not lightly holding that a provincial Act was invalid, and they also explained away the express refusal of the Privy Council to follow the doctrine of *McCulloch* v. *Maryland*.[3] But it must be admitted that in this case at least the attempt was hardly successful: it is indeed perfectly clear that the Privy Council deliberately rejected the doctrine of *McCulloch* v. *Maryland*, and rejected it for the reason that the cases of the United States and Canada differed in the fact that the federal power had no control over State Acts, while the Dominion Government controlled the Acts of the provinces through the power of disallowance. Moreover, the Privy Council laid down the rule of interpretation that they would consider the powers given in the terms of the Act, and held that it would be quite wrong to deny the existence of any power because by some possibility it might be abused or might limit the range which might otherwise be open to the Dominion Parliament. More validity is possessed by the other part of the argument of the High Court that the Commonwealth differed from Canada in the fact that the Commonwealth had no control over the Acts of the States.

The principle laid down in *D'Emden* v. *Pedder*[4] was challenged shortly afterwards by counsel in the case of *The Municipal Council of Sydney* v. *The Commonwealth*.[5] In that case the Municipal Council of Sydney sought to recover rates on land which had passed to the Commonwealth from the

[1] 12 App. Cas. 575. [2] 1 C.L.R. 585, at pp. 608, 609.
[3] 4 Wheat. 316. [4] (1904) 1 C.L.R. 91. [5] (1904) 1 C.L.R. 208.

State of New South Wales, and which were used in connection with the work of the Posts and Telegraphs Department. The levying of such rates was provided for by an Act of New South Wales of 1879 consolidated in the Sydney Corporation (Consolidating) Act, 1902. The Commonwealth claimed immunity under the provisions of s. 114 of the Constitution, which forbids a State without the consent of the Commonwealth Parliament to tax the property of the Commonwealth. But it was also contended that the doctrine of instrumentalities would cover the case, and Wise K.C., for the Council, objected to the doctrine of implied restriction, and argued that the Imperial Parliament could interfere if necessary to prevent destruction of the instruments of the Commonwealth, so that the American doctrine was not necessary in the case of the Commonwealth. Therefore he contended, unless the case fell within the meaning of s. 114, which he denied, the right of levying rates existed. The sovereign right of the State could not be taken away except by express words. In this regard Griffith C.J. contented himself with a reaffirmation of the views which he had expressed in *D'Emden* v. *Pedder*, but both Barton and O'Connor JJ. restated at some length the opinions which they had expressed in that case, and were at pains to insist that the interpretation of the American cases by Marshall C.J. was in itself correct, and should be followed by the High Court with respect to the Commonwealth Constitution, which was made by men who were familiar with the American Constitution and the interpretation which had been put upon it by the Courts of the United States.

The principle of the immunity of instrumentalities was next applied to the protection of State instrumentalities against interference by the operation of Commonwealth laws. The question arose in 1906 as a result of the passing of the Commonwealth Conciliation and Arbitration Act, 1904, which was authorised by the power given to the Commonwealth under s. 51 (xxxv) of the Constitution to legislate regarding conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State. The New South Wales Railway Traffic Employees' Association attempted to register under the Act, registration being a condition of obtaining the advantages of the Act, and their right to do so was questioned by the Federated Amalgamated Government Railway and Tramway Service Association. The question ultimately came to the High Court in the form of a case stated by the President of the Arbitration Court under s. 31 (ii) of the Act of 1904.[1] The case was argued at great length, for the States of New South Wales and Victoria received permission to intervene, and the Court, consisting of Griffith C.J., Barton and O'Connor JJ., decided unanimously in favour of the invalidity of the attempt at registration. The ground of the decision of the Court was that the railways of the States were clearly State instrumentalities, and therefore could not fall under the control of the Commonwealth Parliament, whether under

[1] (1906) 4 C.L.R. 488.

s. 51 (xxxv) of the Constitution or under the general power to regulate commerce and trade given by s. 51 (i) and s. 98. They held that under these sections the power of the Commonwealth went no further than to prohibit, for causes affecting interstate traffic, specific persons from being employed in such traffic, and the Court were by no means certain that the power went even so far as that. The Court expressly adopted and approved the principle which they had already laid down in *D'Emden* v. *Pedder*,[1] and applied it equally to the activities of the Commonwealth, which could no more interfere with State instrumentalities in any way than the State with Commonwealth instrumentalities.

It is significant that among the counsel employed on the case was Mr. Higgins,[2] who shortly after became a Judge of the High Court. He urged upon the Court the view that the doctrine as interpreted by the Court was unnecessarily unfavourable to the powers of the Commonwealth, and Mr. Isaacs,[3] who likewise joined the Bench shortly afterwards, supported the validity of the Act on the ground of the plenary legislative powers of the Commonwealth within the sphere of influence open to it.

The doctrine of the immunity of instrumentalities had so far been victorious in the Commonwealth, but it was destined to fare roughly at the hands of the Judicial Committee of the Privy Council, to whom the matter came on appeal from the Supreme Court of Victoria in another of the income-tax cases, *Webb* v. *Outtrim*.[4] The Victorian Court, following the decision of the High Court in the cases of Deakin and Lyne, had decided that an officer of the Commonwealth was not liable to pay the State income tax, and the Privy Council reversed the decision. The judgment has the merit of extreme brevity, in which it contrasts conspicuously with the judgments of the members of the Commonwealth High Court, but it is somewhat meagre. It is clear, however, that the Committee objected *in toto* to the doctrine that *McCulloch* v. *State of Maryland*[5] should be followed in dealing with the relations of the States of Australia and the Commonwealth. Stress was laid on the fact that the States of the United States possessed powers of independent legislation greater than those possessed by the Australian States, but it was also pointed out that a State statute once passed was not open to be impeached on any ground of implied prohibition. It was recognised as provided in the Commonwealth Constitution that a Commonwealth Act might override a State Act, but it was denied that a State Act within the limits of the powers left to the States could be invalid because of some prejudicial effect to the federal Government.

The result of the decision of the Privy Council was plainly seen when, as was inevitable, the question was again raised in the High Court in the

[1] (1904) C.L.R. 91. [2] 4 C.L.R. 488, at pp. 500 *seq.*
[3] 4 C.L.R. 488, at pp. 516 *seq.* [4] [1907] A.C. 81. [5] 4 Wheat. 316.

case of *Baxter* v. *Commissioners of Taxation, New South Wales*.[1] In that case the judge of a District Court in New South Wales had given judgment in accordance with the decision of the Privy Council in the case of *Webb* v. *Outtrim*. The Court by a majority of three to two—the two being the new justices Isaacs and Higgins—declined to reconsider the decision reached in the case of *Deakin* v. *Webb*, and adhered to the doctrine of the immunity of instrumentalities as laid down in *McCulloch* v. *Maryland*. There is naturally not much that is new in the views of the majority of the Court, but great interest attaches to the position adopted by Isaacs J. He expressed clearly the opinion that the judgment of the Privy Council could not be upheld if it were really intended to convey the meaning that the State power of legislation extended to legislation which would hamper the action of the federal executive or legislative authority. It was not essential that the power should be expressly withdrawn from the State; the word "expressly" was not found in s. 107 of the Constitution, and should not be imported into that section. The Privy Council itself, in a series of important cases—*Kielley* v. *Carson*,[2] *Doyle* v. *Falconer*,[3] *Barton* v. *Taylor*,[4] and *Fielding* v. *Thomas*[5]—had asserted the doctrine that if anything were granted by the legislature there was at the same time implied a grant of all that was needed to make the main grant effectual, and this principle was fatal to the claim that a State Parliament could hamper the exercise of Commonwealth authority. S. 107 of the Constitution expressly recognised that powers exclusively vested in the Parliament of the Commonwealth were no longer within the power of the State Parliament, and what power could be more exclusively vested in the Commonwealth Parliament than the regulation and control of Commonwealth administration? But he was unable to recognise in the Income Tax Act any infringement of the doctrine of non-interference with Commonwealth powers. The income tax was demanded from all citizens alike, and was obviously not levelled at the federal authority, and he could not persuade himself that there was, or was likely to be, any diminution or impairment of service rendered to the Commonwealth through the imposition of the tax. Nor could he overlook the important fact that the conditions of America were different from those of the Commonwealth; the Royal power of veto existed, and could not be disregarded, and its existence rendered it less necessary to hold that any given Act was an invasion of the powers of the Commonwealth.

Higgins J.,[6] who agreed with Isaacs J. in thinking that the decision of the Privy Council should be accepted as correct, based his view on different grounds from those adopted by his colleague. He considered that the principle of *McCulloch* v. *Maryland*,[7] if adopted at all, must lead

[1] (1907) 4 C.L.R. 1087. [2] 4 Moo. P.C. 63. [3] L.R. 1 P.C. 328.
[4] 11 App. Cas. 197. [5] [1896] A.C. 600. [6] 4 C.L.R. 1087, at pp. 1161 *seq.*
[7] 4 Wheat. 316.

to the decision in *Deakin* v. *Webb*,[1] thus disagreeing with the ingenious distinction drawn by Isaacs J. between the cases, but he held that the decision of Marshall C.J. was wrong, and had carried beyond proper limits the doctrine of necessary implication. It should, however, be noted that in effect his view came fairly close to that of Isaacs J., for he seemed to think that the Chief Justice in that famous case might properly have held that the whole act of the Maryland legislature was fraudulent and void as an attempt not to tax citizens at all, but to interfere with a federal agency.

It would have been of great interest to have had the opinion of the Privy Council on the questions at issue, but unhappily from the point of view of jurisprudence the Parliament of the Commonwealth, while entertaining little doubt of the soundness of the decision of the High Court, decided to defer to the demands of the States, and to allow the taxation of the salaries of federal officers. It is extremely difficult to see how such an Act could be *intra vires* the Commonwealth Parliament if it were implicitly forbidden by the Constitution,[2] but at any rate the Parliament so legislated, and when there was made an attempt to obtain review of the whole subject from the Privy Council[3] that august body declined to grant special leave to appeal, on the ground that the question involved trifling sums, and could not arise again. Whether the prophecy is true is uncertain, as an officer of the Commonwealth in South Australia has declined to admit the validity of the federal Act, and the loss of a reasoned judgment of the Privy Council is to be deplored, but it is perfectly clear that their decision of any case would have adhered very closely to the lines laid down in *Webb* v. *Deakin*,[4] which, if somewhat perfunctory, is really merely a reassertion of principles which the Privy Council had long applied to Canadian cases.

On the other hand, it is clear that the High Court is not prepared to carry the doctrine of the immunity of instrumentalities beyond reasonable limits. This was clearly shown in the case of *The King* v. *Sutton*,[5] which arose out of the forcible removal, under orders of the New South Wales Government, of a quantity of wire-netting from the control of the Customs without payment of duty, on the ground that the Commonwealth could not tax the Crown in New South Wales. The doctrine of the immunity of instrumentalities was not indeed forced in that case upon the Court, for there could be no doubt that the importation of wire-netting to be sold to farmers could only by a stretch of language be deemed the operation of a State instrumentality. But the Court was invited to accept the doctrine that the Crown could not be bound except by express words, and no such words appeared in the Act. The Court unanimously rejected this plea, and, while admitting

[1] 1 C.L.R. 585. [2] Cf. 4 C.L.R. 1178, at p. 1194, *per* Higgins J.
[3] *New South Wales Commissioners of Taxation* v. *Baxter*, [1908] A.C. 214.
[4] [1907] A.C. 81. [5] (1908) 5 C.L.R. 789.

the sovereign powers of the States in their own spheres of activity, insisted on the fact that the Crown in the Commonwealth was distinct from the Crown in the States, and that the rule that a statute does not bind the Crown save by express words or necessary implication applied only to those representatives of the Crown who had executive authority in the place where the statute applied, and as to matters to which that executive authority extended. The Customs Act, 1901, bound the States but not the Commonwealth, and the removal of the wire-netting was a wrongful act.

In a second case of the same date (*Attorney-General of New South Wales* v. *Collector of Customs of New South Wales*[1]) the question of instrumentalities came definitely before the Court. In that case the goods in question which the State of New South Wales claimed to be entitled to import free were steel rails for use in connection with the Government railways of the State, and the position of the State appeared naturally to be greatly strengthened by the decision in the *Federated Amalgamated Government Railway and Tramway Service Association* v. *New South Wales Railway Traffic Employees Association*[2] that the Commonwealth Conciliation and Arbitration Act, 1904, could not apply to a State railway. The Court rejected this view on the ground that the rule of interpretation adopted in that case, and laid down in *D'Emden* v. *Pedder*,[3] could not apply where a power conferred on the Commonwealth in express terms was of such a nature that its effective exercise manifestly involved the control of some operation of a State Government, and they instanced as possible cases of such legislation legislation based on the powers given by s. 51 of the Constitution to legislate as to quarantine (ix), weights and measures (xv), immigration (xxvii), and trade and commerce with other countries and among the States (i). Moreover, the rule had no application to the question whether any specific thing might be brought within the State so as to become such a means or instrumentality. Further, it was pointed out that the doctrine, if applied in such a case, would utterly defeat the whole purpose of the creation of the Commonwealth, for the State could render null the Customs Act by importing all the goods required for use by any persons in the State as State property. Similarly quarantine and immigration laws could be set at nought and the whole operation of the Commonwealth defeated.

Reserved Powers of States.—Almost contemporaneously with the appearance of the doctrine of the immunity of instrumentalities there was developed a doctrine which was destined to cast doubt upon much of the validity of Commonwealth legislation, though in the first case in which it was enunciated the decision was no doubt correct. That was the case of *Peterswald* v. *Bartley*,[4] on appeal from the Supreme Court of New South Wales, which had held that an Act of that Colony passed

[1] (1908) 5 C.L.R, 818. [2] 4 C.L.R. 488. [3] 1 C.L.R. 91.

[4] (1904) 1 C.L.R. 497: cf. *Robinson* v. *Hall*, [1906] S.A.L.R. 16, at pp. 21, 22, *per* Gordon J.

in 1898, imposing licence duties on the manufacturers of beer, was no longer valid in view of the sole control of matters of excise given to the Commonwealth Parliament by the Constitution, s. 90. The decision was naturally far from acceptable to the State Government, and the High Court of Appeal reversed the finding of the Supreme Court. The question on which the decision turned was really simple. Did the word "excise" in the Constitution include all the duties which very roughly are classed in certain Imperial acts regarding administrative matters as excise duties, or did it mean what it had been treated by the legislatures of Australia to mean, an indirect tax corresponding with duties of customs? The decision could hardly be in much doubt, and it was in favour of the narrower interpretation of the term, the interpretation which unquestionably the framers of the Constitution had in mind in using the word; but the Chief Justice, in delivering the judgment of the Court, laid down a rule of construction as follows[1]: "In construing a Constitution like this it is necessary to have regard to its general provisions as well as to particular sections, and to ascertain from its whole purview whether the power to deal with such matters was intended to be withdrawn from the States and conferred upon the Commonwealth. The Constitution contains no provisions for enabling the Commonwealth Parliament to interfere with the private or internal affairs of the States, or to restrict the power of the States to regulate the carrying on of any businesses or trades within their boundaries, or even, if they think fit, to prohibit them altogether. That is a very important matter to be borne in mind in considering whether this particular provision ought to be construed so as to interfere with the States' powers in that respect. If the majority of the Supreme Court were right, the Constitution will have given to the Commonwealth, and withdrawn from the States, the power to regulate their internal affairs in connection with nearly all trades and businesses carried on in the States. Such a construction is altogether contrary to the spirit of the Constitution, and will not be accepted by this Court unless the plain words of the provisions compel us to do so."

In the course of the judgment the cases of the *Brewers' and Malters' Association of Ontario* v. *The Attorney-General for Ontario*[2] was quoted with approval as laying down the principle that such a tax as a licence duty was a valid exercise of the provincial power of direct taxation, though of course it might be misused so as really to become an indirect tax, and so would be regarded as invalid; and the American case of *Brown* v. *Maryland*,[3] which established the invalidity of a State tax on importers as virtually a tax on the importation of goods, was also distinguished on the ground that the States of America had no power of interference with the freedom of importation, while in the case before the Court the State was undoubtedly competent to forbid if it wished the following of the occupation of a

[1] C.L.R. 497, at p. 507. [2] [1897] A.C. 231. [3] 12 Wheat. 419.

manufacturer of beer, and, if it sanctioned it, to submit it to such dues as it thought fit.

The doctrine of the implied prohibition of interference in matters reserved to the State Parliaments appeared in its strongest form in the case[1] which arose out of the "new protection" policy of the Commonwealth Parliament.[2] This policy was intended as a counterpart to the levying of a high tariff and to secure to the workers their share in the advantages which accrued to the manufacturers by the enactment of a high tariff. Accordingly, by the Excise Tariff, 1906 (Act No. 16 of 1906), an excise duty was placed *inter alia* on implements manufactured in Australia, but an exemption was given if the conditions as to remuneration of labour specified in the Act were complied with. Under the Act penalties were claimed against Barger and McKay, manufacturers of agricultural implements, who declined to comply with the conditions specified or to pay the excise duties. The State of Victoria was permitted to intervene in support of the objection to the Act. The Court as usual were divided in opinion: the majority of Griffith C.J., Barton and O'Connor JJ., were against the validity of the Act, the other two judges in favour of it.

The decision of the Court recognised that the language of an Act was not decisive as to its character, which was determined by the substance of the legislation. They held also that taxation was essentially different in a federal State from the power to regulate indirectly the domestic affairs of the States, a power denied to the Commonwealth Parliament, and that the power to tax must not be used so as directly to interfere with the control of the domestic concerns of any State. To select a method of taxation which made the liability to taxation dependent on conditions to be observed in the industry in which they were produced was as much an attempt to regulate the conditions as if the regulation were made by distinct enactment. The Excise Tariff, 1906, was not really an Excise Act, but an Act to regulate the conditions of manufacture of agricultural implements, and was not an exercise of the power of taxation of the Commonwealth. The Act was also open to the objection that it dealt with the regulation of the conditions of manufacture as well as excise, and so contravened the express provision of s. 55 of the Constitution, which confines an Excise Act to matters of excise, and, moreover, even if every other objection could be overcome, the Act would be invalid, as it authorised discrimination between States, and so violated s. 99 of the Constitution, which forbids any preference of one State over another.

The two dissenting judges, on the other hand, maintained that the true mode of treating the question was not to assert the doctrine of implied prohibition, but to construe the powers granted to the Commonwealth in as full a manner as if the Commonwealth Parliament were that of a unitary State. The powers of the States were the residual powers remaining after

[1] (1908) 6 C.L.R. 41. [2] See the Commonwealth *Official Yearbook*, No. 3, p. 1041.

the powers of the Commonwealth had been ascertained, and the possibility of the misuse of a legislative power was no argument against its existence; the remedy lay with the electorate, not with the Courts. The objections aimed at the Act were based on alleged abuse of power, consequences, and motives, all of which the Court was incompetent to entertain. The demand of contributions to the consolidated revenue was taxation, and the Excise Tariff, construed as it stood and not transformed, was still within the powers of the Commonwealth. The Act did not attempt to render unlawful any conditions of manufacture; it was not an Act which a State Parliament could pass, but an exercise of the power of excise taxation, and it did not contravene s. 55 of the Constitution, for it merely imposed taxation. Nor did it discriminate between States, and so did not contravene the provisions of the Constitution forbidding such discrimination.

The same principles, the determination to respect the sphere of action of the State and the wish to interpret strictly the powers granted to the Commonwealth Parliament by the Constitution, were illustrated by the case of the *Attorney-General for New South Wales* v. *Brewery Employees' Union of New South Wales*.[1] In that case the validity of Part VII. of the Commonwealth Trade-Marks Act, 1905, came up for consideration. That section of the Act provides for the registration of workers' trade-marks. These marks or labels were marks affixed to goods to show that they were manufactured by the workers or associations of workers by whom the mark was registered, and the Act penalised the use of marks in the case of goods not produced by the workers or associations. The aim of the enactment was, of course, to extend the influence of trade unions by allowing the immediate identification of goods as produced under union conditions, and several brewery companies of New South Wales questioned the validity of Part VII. There were several other points at issue: (1) whether the companies were substantially injured by the mere existence of the law, (2) whether the Attorney-General of New South Wales had a right to intervene on behalf of the public of the State, and (3) whether an injunction was the proper remedy; but all these points were settled in favour of the plaintiffs, though Isaacs and Higgins JJ. dissented on heads (1) and (3), and Higgins also on head (2). The decision of the Court was against the validity of the part of the Act attacked. They held (Griffith C.J., Barton and O'Connor JJ.) that the power of the Commonwealth to legislate as to trade-marks did not extend to permit the creation of what was not a trade-mark at all in the sense of that word as understood in 1900, the date of the enactment of the Constitution. As O'Connor J.[2] pointed out, a workers' trade-mark was deficient in both of the essential characteristics of a trade-mark as ordinarily understood—a trade or business connection between the proprietor of the trade-mark and the goods in question, and distinctiveness in the sense of being used to distinguish

[1] (1908) 6 C.L.R. 469. [2] 6 C.L.R. 469, at p. 540.

the particular goods to which it is applied from other goods of a like character belonging to other people. As the part of the Act did not fall within the powers of the Parliament to legislate as to trade-marks, it could only be supported if it fell under some other head of the powers of the Commonwealth. But though its provisions might be in part justified under the power given by s. 51 (i) of the Constitution to legislate regarding trade and commerce with other countries and between the States, nevertheless the substantive aim of the part of the Act concerned was to regulate the internal trade of a State, and that was implicitly prohibited by the express grant of power to legislate for trade with other countries and among the States. "In my opinion," said Griffith C.J.,[1] "it should be regarded as a fundamental law in the construction of the Constitution that where the intention to reserve any subject-matter to the States to the exclusion of the Commonwealth clearly appears, no exception from that reservation can be admitted which is not expressed in clear and unequivocal words. Otherwise the Constitution will be made to contradict itself, which upon a proper construction must be impossible."

On the other hand, Isaacs J.[2] and Higgins J.[3] were equally clear that the power to legislate as to trade-marks covered the actual legislation which had been passed. The former by an elaborate examination of the true meaning of trade-marks arrived at the conclusion that it merely imported a mark used in trade and connected in some way with goods in order to identify the goods with persons. The Commonwealth Parliament was therefore fully entitled to confer the right of having workers' trade-marks on such persons as it thought fit, and its legislation in that regard would override any State legislation to the contrary. "I confess," he said, "I do not understand the doctrine which acknowledges the plenary character of powers, and at the same time restricts them. Denying complete supremacy with regard to a power affirmatively granted is a doctrine which seems to me incompatible with s. 5 of the Commonwealth of Australia Constitution Act, and one which leads not merely to constant conflict, but also to inevitable uncertainty as to the respective spheres of national and State action and authority."

Higgins J. held that the workers' trade-mark contained all the essential characteristics of a trade-mark as understood at the time of the passing of the Constitution, although not all the essential characteristics of a trade-mark then enforceable in British Courts. The term must be understood in its full grammatical and ordinary sense in 1900, and he argued further that even if the workers' trade-mark went beyond the sense usual in 1900, the Constitution gave the Parliament power to say what marks should be recognised as trade-marks and what not, and the meaning of the expression in 1900 gave the centre, not the circumference of the power. He countered

[1] 6 L.C.R. 469, at p. 503.
[2] 6 C.L.R. 469, at pp. 559 *seq.*
[3] 6 C.L.R. 469, at pp. 599 *seq.*

the obvious argument that the power of definition might be used to arrogate a power not conferred by the Constitution by quoting the case of *Attorney-General for Quebec* v. *Queen Insurance Co.*,[1] in which the Privy Council rejected the attempt of a provincial legislature in Canada to enact a stamp tax (which, under the British North America Act, 1867, it has no power to do) by imposing what was really such a tax in the form of a business licence.

The same principle came again into question in the case of *Huddart Parker & Company Proprietary, Limited*, v. *Moorehead* and *Appleton* v. *Moorehead*.[2] The question there raised arose out of the Australian Industries Preservation Act, 1906. The Act in question provided in ss. 5 and 8 penalties with regard to foreign corporations or trading or financial corporations formed within the Commonwealth which entered into combinations to restrain trade or to form monopolies. In furtherance of the purposes of the Act provision was made by s. 15 (B) of the Act as amended in 1907 empowering the Controller-General to require any person whom he believed to be capable of giving information of an alleged offence to answer questions and produce documents. The Controller-General under this section called upon the company to answer certain questions, and stated that he believed that offences had been committed against the provisions of ss. 5 and 8 of the Act in connection with the trade of the company. In Appleton's case a similar requisition was served, but the charges were stated to arise from ss. 4 and 7 of the Act. The Court upheld the validity of s. 15 (B) of the Act in question, but they decided against the validity of ss. 5 and 8. The Chief Justice and Barton J. held that the power conferred on the Commonwealth Parliament by s. 51 (xx) of the Constitution was power to prohibit foreign corporations and trading and financial corporations formed under State laws from engaging in trade and commerce within a State, as distinguished[3] from trade and commerce between States or with foreign countries, or to impose conditions subject to which they might engage in such trade and commerce, but did not confer upon the Commonwealth Parliament power to control the operations of such corporations which lawfully engaged in such trade and commerce. O'Connor J. held that the power conferred was limited to the making of laws with respect to the recognition of corporations as legal entities within the Commonwealth, and did not include the power to make laws for regulating and controlling the business of corporations when once they had been so recognised and were exercising their corporate functions by carrying on business in the Commonwealth. In coming to the decision the Chief Justice quoted the decision arrived at in the case of *The King* v. *Barger*,[4] the Union Label case, and he laid it down that the Constitution was to be considered as if it contained an

[1] 3 App. Cas. 1090. [2] (1909) 8 C.L.R. 330.

[3] The power to regulate such trading being given in all cases by s. 51 (i) of the Constitution. [4] 6 C.L.R. 41.

express declaration that power to make laws with respect to trade and commerce within the limits of a State, and not limited to the trade and commerce with other countries or among the States, is reserved to the States except so far as the exercise of that power by the Commonwealth is necessary for or incidental to the execution of some other power conferred on the Parliament. To permit the Commonwealth Parliament to regulate the proceedings of a trading or financial corporation in relation to domestic trade would be a flagrant invasion of the spheres of the domestic law of trade and commerce and the domestic criminal law. Higgins J.[1] also agreed with the majority of the Court in holding that the power of the Court could not extend to the regulation of the actions of the corporations. Otherwise the Federal Parliament could create a new law of libel for corporations, new licensing Acts for hotels belonging to corporations, lay down scales of wages for corporations, and so forth.

On the other hand, Isaacs J.[2] protested against the limitations which were being put on the interpretation of the Constitution. He argued that the interpretation to be adopted must be that of the canons of constitutional construction which had been laid down by the Privy Council, whose judicial utterances must have been pre-eminently before the minds of the framers of the Commonwealth Constitution. The canons were binding upon the Court even in cases of disputes as to the rights of the Commonwealth and the States or the States *inter se* on which the decision of the High Court was final, unless that Court chose to grant special leave to appeal, and still more so in cases where the limitation of s. 74 did not apply at all. He quoted the decision of the Judicial Committee in *The Queen* v. *Burah*[3] and *Hodge* v. *The Queen*,[4] and he laid stress upon the plenary powers granted to the Parliament on the subjects on which it had a constitutional right to legislate. He quoted the judgment in *Webb* v. *Outtrim*,[5] in which the Privy Council had rejected the principle of interpretation laid down in *McCulloch* v. *Maryland*,[6] and pointed out that their decision as to the principle of interpretation was binding on the Court, and he reminded the Court that the Supreme Court of Canada in *Abbott* v. *City of St. John*[7] had adopted the principle of *Webb* v. *Outtrim*, confirming the judgment of the Supreme Court of New Brunswick and formally overruling the doctrine of *Leprohon* v. *Ottawa*,[8] which, as Duff J. said, had been already undermined by the decisions of the Judicial Committee. He was careful to distinguish between the rejection of the doctrine of implied prohibition invoked in this case and that of interference with the governmental function of a State which he conceived the Privy Council accepted as valid. He was of opinion, therefore, that it was im-

[1] 8 C.L.R. 330, at p. 412.
[2] 8 C.L.R. 330, at p. 395.
[3] 3 App. Cas. 889.
[4] 9 App. Cas. 117.
[5] [1907] A.C. 81 ; 4 C.L.R. 356.
[6] 4 Wheat. 316.
[7] 40 S.C.R. 597.
[8] 2 O.A.R. 522. Griffith C.J. had declared in *The Municipal Council of Sydney* v. *The Commonwealth*, 1 C.L.R. 208, at p. 223, that this case was settled law in Canada.

possible to adopt, in considering the case at issue, the principle of implied prohibition, and he could not accept the American case as valid in view of the principles laid down by the Privy Council. He pointed out that this claim did not for a moment mean that the Commonwealth could legislate with regard to the internal regulation of such corporations, but only with regard to extraneous circumstances or events, such as trade, finance, contracts, etc. There might be some conflict of jurisdiction with State laws, but the federal control extended to whatever was necessary incidentally to the control of the conduct of the corporation in relation to outside persons. This disposed, in his opinion, of the contention that the Commonwealth Parliament could prescribe a schedule of wages and hours for corporations or exempt them from the general responsibilities attached to them under State law, such as payment of municipal rates or the liability for nuisances as property holders, and enact for them offences appertaining to general police law. In support of this view he quoted the Canadian case of the *Canadian Pacific Railway* v. *Corporation of the Parish of Notre Dame de Bonsecours*,[1] and *Madden* v. *Nelson and Fort Sheppard Railway*,[2] in the first of which it was held that a railway which was under the exclusive jurisdiction of the Dominion Parliament was, nevertheless, as a landowner having a ditch, which, unless properly cleansed, would be a nuisance to other landowners, subject to the provincial law; while in the second case a provincial Act which required fences to be erected for the protection of cattle was held *ultra vires* on the ground that it affected the railway as a railway and not as a landowner. "Why then," he added, "should we shut our eyes to the obvious facts of life and the practical reasons which confront us?—and why, as was said in one case, should we go 'hunting for reasons' to cut down the plain words of the Constitution, and so deprive them of their ordinary signification in frustration of the intention of the Constitution—at all events as that may be gathered on the face of the document?"[3]

The question was again hotly disputed in the case of the *Federated Sawmill Timber Yard and General Woodworkers' Association of Australasia* v. *James Moore & Sons Proprietary, Limited, and others*,[4] decided in June 1909. Among the numerous questions presented by that case the most important was whether the Commonwealth Court of Conciliation and Arbitration had any power to fix an award which was in contradiction with the determination of a Wages Board empowered by a State Act to fix a minimum rate of wages. The majority of the Court held that the tribunal could in its discretion make an award inconsistent with the award of a State Arbitration Court or an industrial agreement made and registered pursuant to a State statute or an industrial agreement enforceable under State law; but they denied the power to interfere with the deter-

[1] [1899] A.C. 367.
[2] [1899] A.C. 626.
[3] 6 C.L.R. 330, at p. 407.
[4] (1909) 8 C.L.R. 465.

mination of a Wages Board empowered by a State to fix a minimum rate of wages. Griffith C.J.[1] based the decision on the doctrine repeatedly laid down by the Court that any invasion by the Commonwealth of the sphere of the domestic concerns of the State appertaining to trade and commerce is forbidden, except so far as the invasion is authorised by some power conferred in express terms or by necessary implication. He could not see any authority to the Commonwealth Parliament to exercise powers to override what was in effect a State Act in this regard. Such a power would be utterly inconsistent with the reservation to the States of the power to regulate their domestic trade, and would substitute the uncontrolled volition of the tribunal for the volition of the State Parliament. O'Connor J.[2] adopted the same line of argument: he held that the federal power and the State power must be interpreted as far as possible so to be consistent with each other, and in case of disagreement the State law must prevail over an award of the Court. On the other hand, Isaacs[3] and Higgins JJ.[4] were quite clearly of opinion that the power of the Court extended to override the award of a Wages Board just as much as it overrode the other categories of industrial settlements mentioned by the other members of the Court. The State Act was of course valid, but it came into conflict with the equally valid exercise of a federal power, and by s. 109 of the Constitution the federal Act prevailed. They quoted the judgments of the Privy Council in the Canadian cases of *Tennant* v. *Union Bank of Canada*,[5] where the Dominion right to regulate banks was held to override the provincial legislation on mercantile law; of *Grand Trunk Railway Company of Canada* v. *Attorney-General of Canada*,[6] where a prohibition by the Dominion Parliament on contracting out by railway companies was held to prevail over the right of contracting out given by a provincial statute; and *La Compagnie Hydraulique de St. François* v. *Continental Heat and Light Company*,[7] where a Dominion Act incorporating a company and conferring upon it certain privileges was held to override a provincial Act incorporating another company. Although in all these cases the provincial power was properly exercised, there was nevertheless a conflict with the provisions of the federal Act also duly passed, and the Privy Council asserted the paramountcy of the federal Act, although the British North America Act contains no section corresponding with s. 109 of the Commonwealth Constitution. Moreover, they pointed out if there were objections to the overriding of States' determinations there were at least equal objections to the inability of the Conciliation and Arbitration Court to make effective awards if it were bound by determinations in the States and the setting up of the rule would paralyse the action of the Commonwealth Court. If the contention of the majority of the Court were adopted, there

[1] 8 C.L.R. 465, at pp. 492 *seq.*
[2] 8 C.L.R. 465, at pp. 511, 512.
[3] 8 C.L.R. 465, at pp. 527 *seq.*
[4] 8 C.L.R. 465, at pp. 545 *seq.*
[5] [1894] A.C. 31.
[6] [1907] A.C. 65.
[7] [1909] A.C. 194.

would—Isaacs J. held[1]—be practically no federal Constitution at all, and the Commonwealth would only legislate on sufferance.

As a matter of fact, the importance of the decision of the Court in practice was greatly lessened by the decision of the Court in the *Australian Boot Trade Employees' Federation* v. *Whybrow and others*.[2] The Court there held that it was competent for the Conciliation and Arbitration Court to fix a minimum rate of wages in excess of those fixed by the award of a Wages Board. The ground for the decision was that it was competent for the Court to do anything which the two parties could themselves have done, and that therefore as the parties could have agreed, without breach of the trade board's award, upon a higher rate of wages than was actually stipulated in the award as a minimum, the Court was not contravening the award of the Wages Board by fixing a minimum which was higher than the minimum applied by the Wages Board. With this decision practically all the force of the previous decision is lost, although the previous decision still remains technically valid.

The powers of the Commonwealth Court of Conciliation and Arbitration were further considered in the case of *The King* v. *Commonwealth Court of Conciliation and Arbitration, ex parte Whybrow & Co.*[3] The case is of particular interest, as several important collateral questions were raised.

In that case an application had been made to the President of the Court —Higgins J.—by the Australian Boot Trade Employees' Federation asking for the intervention of the Court in an alleged industrial dispute between the Federation and certain employers carrying on business as boot manufacturers in the States of New South Wales, Victoria, Queensland, and South Australia. He made an award on certain points and in accordance with the terms of the Conciliation and Arbitration Act, 1904, he exercised the power of declaring his award to be a common rule for the whole trade.

The employees, being unable to bring an appeal from the award itself under the Act which forbids an appeal, applied for and obtained a rule nisi for a prohibition to restrain the Court and the Boot Trade Employees Federation from further proceedings upon the order and award. They claimed, among other things, that the Act of 1904 was unconstitutional and beyond the powers of the Parliament of the Commonwealth. On the other hand, it was objected on behalf of the Boot Trade Employees that the High Court had no power to issue prohibition against the Commonwealth Court of Conciliation and Arbitration.

This objection to the jurisdiction of the Court was rejected by all the four justices by whom the case was heard. The point for the Employees'

[1] 8 C.L.R. 465, at p. 529; cf. also p. 535. The whole argument is most interesting and effective.

[2] Decided March 30, 1910. See Harrison Moore, *Commonwealth of Australia*, 2nd ed. p. xxvii.; 10 C.L.R. 266.

[3] (1910) 11 C.L.R. 1.

Federation was put in two ways. In the first place it was argued that a prohibition was within the language of s. 31 of the Act of 1904, which enacted that "no award of the Court shall be challenged, appealed against, reviewed, quashed, or called in question in any other Court on any account whatsoever." In the second place, under the Constitution (s. 73) an appeal lay to the High Court from every Federal Court unless otherwise enacted by Parliament, and as an appeal had been denied by s. 31 of the Act of 1904 the jurisdiction of the Court was denied on any question which could be raised by appeal. To this argument Griffith C.J. pointed out as a complete answer that in the first place, in *Clancy's Case*[1] the Court had decided on identical words in the New South Wales Industrial Arbitration Act, 1901, that the enactment did not apply to cases in which an inferior Court had exceeded its jurisdiction, and in the second place, even if no appeal lay to the prohibiting Court, it did not follow that enforcement of the judgment might not be prohibited by a Court having jurisdiction to make an order; indeed, in the great majority of cases of prohibition, the prohibiting Court was not a Court of Appeal from the Court prohibited.

The other ground of objection was that the Court had no original jurisdiction to grant prohibition to an inferior federal Court. To this the answer was—according to the Chief Justice[2]—that s. 75 (v) conferred original jurisdiction upon the High Court in all matters in which a writ of mandamus or prohibition or injunction was sought against an officer of the Commonwealth. Prohibition did not lie except to persons exercising judicial or quasi-judicial functions, and it could not be denied that the judge of the Arbitration Court was an officer of the Commonwealth or that his functions were judicial. Even if the words of s. 75 were ambiguous, the necessity of such controlling power was so apparent that the ambiguity should be resolved in favour of the power. But in any case the Court clearly had jurisdiction under the express words of s. 76 of the Constitution, which authorised Parliament to confer jurisdiction on the High Court in any matter arising under or involving the interpretation of the Constitution or arising under any law made by Parliament, and s. 33 of the Judiciary Act, 1903, which authorised the Court to make orders or direct the issue of writs requiring any Court to abstain from the exercise of any federal jurisdiction which it did not possess.

Barton J.[3] concurred in the view of the Chief Justice on this point. O'Connor J.[4] held that s. 71 of the Constitution, which declares that the judicial power of the Commonwealth shall be vested in the High Court of Australia, was sufficient to confer upon the High Court the power to keep inferior Courts of the federal judicial system from exceeding their jurisdiction. It was also given by s. 75 (v), which clearly applied to judicial as well as to non-judicial officers. Moreover, s. 76 of the Constitution and s. 33 (*b*)

[1] 1 C.L.R. 181.
[2] 11 C.L.R. 1, at pp. 20-22.
[3] 11 C.L.R. 1, at p. 33.
[4] 11 C.L.R 1, at pp. 40-42.

of the Judiciary Act gave the power, even had it not been given by the other sections of the Constitution.

On the other hand, Isaacs J.[1] held that s. 75 (v) did not confer the power in question. Prohibition to another Court was not original but appellate jurisdiction. The power given in s. 33 (*b*) of the Judiciary Act must be exercised within the range of the original jurisdiction conferred, and to which it was expressly restrained, but he held that s. 31 of the Conciliation and Arbitration Act, 1904, did not cover the entire field of appellate jurisdiction as used in s. 73 of the Constitution. The expression "appealed from" in that section was used in the sense of the correction of error in the course of adjudication, and not as including a denial of jurisdiction to adjudicate. When the Legislature intended to take away entirely the power of the superior Courts to keep subordinate tribunals within the limits assigned, clear words were invariably used, as in s. 52 of the New South Wales Industrial Disputes Act, 1908. No such provision had been made in this case, and the form of words employed did not indicate that the parliamentary exception was intended to be as wide as the constitutional grant, and consequently the power to prohibit for want or excess of jurisdiction remained.

On the main question the opinion of the Chief Justice[2] was as follows: The questions at issue were, in the first place, that the constitution of the Court was not such as was authorised by the power given in the Constitution to make laws with respect to conciliation and arbitration for the prevention and settlement of industrial disputes; and secondly, that several provisions of the Act itself, notably that relating to the common rule, were not within the power granted, and that those provisions were so intimately bound up with the rest of the Act that if they were eliminated the rest of the Act would have a substantially different character and the whole Act was therefore invalid. In favour of the first contention it was argued that the concept of arbitration as it existed in 1900 presumed (1) that the submission was voluntary, (2) that at least some part of the tribunal was chosen by the disputants themselves either directly or indirectly, (3) that the tribunal was not fettered by the ordinary formalities of legal procedure, and its functions were not limited to determining existing rights, but could prescribe rules of conduct for the future within the limits of law, and (4) that the function of an arbitrator was a judicial function to be exercised after hearing both sides. The Chief Justice pointed out that in his opinion the list of statutes which was mentioned by Isaacs J. did not permit of doubt that the voluntary submission and the choice of arbitrators were not an essential part of the term "arbitration," the word "arbitrator" and "arbitration" having been used by the English Parliament to denote a tribunal with respect to which the essential element of the concept was absolute discretionary power, only fettered by the limits of the dispute submitted to arbitration and the law of the land. He

[1] 11 C.L.R. 1, at pp. 46-9. [2] 11 C.L.R. 1, at pp. 22 *seq.*

herefore dismissed the first two parts of the first objection to the validity of he Act. With regard to the latter two he held that the proceedings must e of a judicial character, and that the arbitrator must not legislate. With egard to the provisions of the Act relating to the common rule which urported to authorise the Court to declare that any condition of employment letermined by an award should be a common rule of an industry, and that vhich provided that a State law or an award should yield to an award by a Court, he pointed out that the second was *ultra vires*, and with regard to the irst, while not deciding, as it was unnecessary for the purposes of the case, ie assumed that the provisions objected to were *ultra vires*. But assuming hat these provisions were *ultra vires*, he still thought that they were severable rom the other provisions of the Act. It had been contended on the strength f decisions of the Supreme Court of the United States that if the Court, on consideration of the whole statute and rejecting the part held to be *ultra ires*, were unable to say that the Legislature would have adopted the rest vithout them, the whole statute must be held invalid. But this test he hought inaccurate. What a man would have done in a state of fact which ievei existed was a matter of mere speculation which a man could not ertainly answer for himself, much less for another. The safer test was vhether the statute with the invalid portions omitted would be substantially different law as to the subject-matter dealt with by what remained from vhat it would be with the omitted portions forming part of it. On the whole, ie was unable to say that the Act with the alleged invalid provisions omitted vas substantially so different a law as to what was left from what it would be vith those provisions included that the Court would by substantiating the alidity of what was left be making a law which the Parliament did not make. He proceeded therefore to uphold the validity of the determination in the ctual case subject to certain qualifications which are not material to the uestion at issue.

Barton J.[1] agreed that arbitration did not include a power to the arbitrator o regulate a particular trade. That would be giving the tribunal a power o legislate which no torture of words could twist into arbitration. The rbitral tribunal must at any rate be judicial and not legislative. It could ot overpass the area of the dispute as to subject-matter or as to disputants, or could the settlement be something to which the disputants could not, if hey would, agree. If that which purported to be a settlement effected to ind others than the disputants, the function performed by the tribunal was ot arbitration, any more than such a decision by a Court would be a idgment. He did not decide as to s. 28 of the Act authorising the declara- on of the common rule; but assuming its invalidity, he still held that the rovisions questioned did not effect the valid portion of the Act, which ierefore had due effect. O'Connor J.[2] also declined to pass an opinion on ie common rule provision on the ground that it was separable, and he

[1] 11 C.L.R. 1, at pp. 33 *seq.* [2] 11 C.L.R. 1, at pp. 43 *seq.*

concurred in the judgment proposed by the Chief Justice. Isaacs J.[1] showed that arbitration did not exclude a possible choice of arbitrators, and he quoted a long series of Imperial Acts[2] in favour of this contention, and he also referred to the Canadian Act, No. 40 of the Revised Statutes of 1886. He went in detail through the sections of the Act which were alleged to be invalid, and showed that in most cases no real question arose. On the other hand, the question of the common rule did give rise to some difficulty. On the one hand the provisions had the appearance at first sight of regulation not necessarily dependent upon actual or threatened disputes; and on the other hand they seemed absolutely necessary to the effective application of the remedy of conciliation and arbitration for the prevention and settlement of disputes. The preventive jurisdiction was certainly intended to be a real and substantial power as preserving the peaceful course of industry, and its operation might prove more beneficial than the actual settlement of disputes after they had broken out, and he was not satisfied that sufficient weight had been given in the argument to this phase of the power and the effect of the word "prevention," or the word "arbitration," or the expression "industrial dispute" in its ampler constitutional signification. But he did not propose to express a decided opinion upon the matter, partly because the constitutionality of the Act was not raised before the President of the Court (Higgins J.), and the Court had not the advantage of his presence or of a case stated by him. The provisions were, in his opinion, separable, and he accepted as a principle of discrimination the rule that if good and bad provisions were included in the same word or expression the whole must fail; where they were contained in separate words or expressions, then if the good and the bad parts were so mutually connected with and dependent upon each other as to lead the Court, upon applying the language to the subject-matter, to believe that Parliament intended them as a whole, and did not pass the good parts as independent provisions, all the provisions so connected and dependent must fall together, but otherwise the good portions could stand, and in the case in question he held that certain of the provisions were valid.

In a subsequent case the logical outcome of this decision was seen in the declaration of the invalidity of the common rule, with grave results to the efficiency of the working of the Conciliation and Arbitration Court. Moreover, shortly after the question of the legislative authority with regard to the coasting trade was considered by the High Court of the Commonwealth in the case of the Seamen's Compensation Act of 1909 (No. 29 of 1909). In the case in question—*S.S Kalibia* v. *Wilson*[3]—the vessel was chartered to carry cargo from New York to Australian ports, which under the charter

[1] 11 C.L.R. 1, at pp. 49 *seq.*

[2] The list includes 45 & 46 Vict. c. 56; 51 & 52 Vict. c. 41; 53 & 54 Vict. c. 70; 63 & 64 Vict. c. 59.

[3] Decided in December 1910; not yet in C.L.R.

were to be Adelaide, Melbourne, Sydney, and Brisbane. No other trading was contemplated by the charter; but as a mere matter of courtesy a small package, 7 lb. in weight—which had been part of the cargo of another ship, and had been inadvertently left behind at Adelaide—was carried by the captain to Brisbane. No charge was made, no bill of lading or ship note was signed, and the package was not entered in the ship's manifest.

The respondent shipped at Sydney as a seaman for the voyage to Brisbane and back, and was injured by an accident before the ship reached Brisbane, where he was discharged. It was sought by the respondent to have the ship detained under the powers conferred by s. 13 of the Act, which provides that if it is alleged that the owner of a ship actually within the territorial waters of Australia is liable as such to pay compensation under the Act, a justice of the High Court or a judge of the Supreme Court may issue an order for detention of the ship until security has been given for payment of compensation. By s. 4 of the Act it was made to apply to the employment of seamen engaged in the coasting trade, and a ship was to be deemed to be engaged in the coasting trade "if she takes on board passengers or cargo at any port in a State . . . to be carried to and landed and delivered at any port in the same State . . . or another State."

Mr. Justice Street made an order for the detention of the vessel, and Mr. Justice Gordon refused to discharge the order, and from this order an appeal was brought on two grounds—

(1) that upon the undisputed facts the Act did not apply to the ship in question, and

(2) that the Act was not within the powers of the Parliament of the Commonwealth.

The Court held that the first ground for appeal was clearly justifiable. It was laid down that as a general rule a ship could not become engaged in the coasting trade without the knowledge and volition of the owner or of some person for whose acts he was responsible. There was nothing to suggest that the chief officer or the master, who offered no objection, had any authority on behalf of the owners to engage the ship in the coasting trade, even if the isolated transaction were otherwise within the words of the section. The words "taken on board" and "to be carried" imported a contract of carriage made on behalf of the ship, and did not include a promise made by a passenger, or any other person not authorised to bind the owners, to carry on board the ship goods as to which the owner did not incur any responsibility.

The Court, although they considered that the matter could be disposed of on that ground, decided, as the Commonwealth had intervened by permission, to give a decision on the general question of the validity of the Act. Two objections were made to its validity. First, that provisions for compensation to seamen could not under any circumstances fall under the trade and commercial power of s. 51 (i) of the Constitution, and that if they

did the particular Act was invalid for another reason. The first question the Court declined to deal with on the ground that it was abstract, but the second question they dealt with in detail. S. 4 (1) provided that the Act applied in relation to the employment of seamen (*a*) on any ship registered in the Commonwealth when engaged in the coasting trade, and (*b*) on any ship, whether British or foreign, engaged in the coasting trade, if the seaman had been shipped under articles of agreement entered into in Australia. It appeared therefore that the law applied to all trade between different Australian ports, and not merely to trade between ports of different States; if there were any doubt about this as regards sub-s. 1 it was made clear by the terms of sub-s. 2 cited above. Now it was not open to argument that the power to make laws with respect to trade and commerce with other countries and among the States given by the Constitution extended to authorise the Parliament to legislate with respect to the internal trade of a State. It followed that the provisions of s. 4 of the Act went beyond the powers of the Parliament so far as they purported to regulate purely internal coasting trade, and were to that extent invalid. Then the Court considered whether the valid provisions could be separated from the invalid provisions, and they laid down, as in the *Railway Servants' Case*[1] and the *Bootmakers' Case*,[2] the principle that when, in the attempted exercise of a power of limited extension, an Act is passed which in its terms extends beyond the prescribed limits, the whole Act was invalid unless the invalid part was plainly separable from the valid. They held that in this case, to interpret the law as referring only to inter-State trade would be to create a new law, and not to carry out the intended law. When the Legislature assumed jurisdiction over a whole class of ships, over some of which it had and over others it had not jurisdiction in point of law, and plainly asserted its intention to place them on the same footing, the Court would be making a new law if it gave effect to the statute as a law intended to part only of the class.

The Court therefore held that the whole Act was invalid, and reversed the decision of the Court below.

It is important to note that this decision evidently treats the power to deal with navigation as referring only to navigation between the States, and therefore that the Parliament of the Commonwealth has no power to deal with merchant shipping, except in so far as shipping between the various States is concerned. Unless and until therefore the Federal Constitution is amended, it will be impossible for the Parliament of the Commonwealth to pass any effective merchant shipping legislation.

As the result of the unsatisfactory position as to the powers of the Commonwealth Parliament the Labour Government secured in 1910 the passing through the Commonwealth Parliament of two Bills which were to give to the Parliament of the Commonwealth all necessary power to deal with questions affecting trade and labour conditions.

[1] 4 C.L.R. 488. [2] 11 C.L.R. 1.

It was proposed by the first Bill,[1] the Constitution Alteration (Legislative Powers) Bill, 1910, to amend s. 51 of the Constitution by omitting from paragraph (1) the words "with other countries and among the States," thus giving to the Parliament full power to deal with trade and commerce throughout the Commonwealth, and by inserting as a new paragraph xx. in place of the old paragraph which ran: "Foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth," the words:

Corporations, including—
(*a*) the creation, dissolution, regulation, and control of corporations;
(*b*) corporations formed under the law of a State (except any corporation formed solely for religious, charitable, scientific or artistic purposes, and not for the acquisition of gain by the corporation or its members) including their dissolution, regulation, and control; and
(*c*) foreign corporations, including their regulation and control.

The old paragraph (xxxv) of s. 51 of the Constitution was to be altered by omitting the words: "Conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State," and inserting in their place the words:

Labour and employment, including—
(*a*) the wages and conditions of labour and employment in any trade, industry, or calling; and
(*b*) the prevention and settlement of industrial disputes, including disputes in relation to employment on or about railways the property of any State.

Moreover, a further paragraph (xl.) was to be added to s. 51 empowering the Commonwealth to legislate in respect of "combinations and monopolies in relation to the production, manufacture, or supply of goods or services."

The second Bill empowered the Commonwealth to make laws for carrying on an industry or business by or under the control of the Commonwealth, and to acquire for that purpose on just terms any property used in connection with the industry or business, provided that each House of the Parliament in the same session had by resolution declared that the industry or business of producing, manufacturing, or supplying any specified goods or of supplying any specified services is the subject of a monopoly.

The question what use would be made of this great power naturally aroused much interest in Australia, and the Acting Premier, Mr. Hughes, issued to the press on December 9, 1910, a memorandum which he had addressed to the States Premiers regarding the scope of federal legislation under the new constitutional powers to be given to the Commonwealth.

He anticipated that the legislation passed would include legislation to enforce the new protection policy; such amendments of industrial legislation as might be necessary for the prevention and settlement of industrial disputes and to secure a fair and reasonable wage for all classes of workers where those

[1] See *Commonwealth Gazette*, 1911, pp. 757 *seq.*

matters had been only partially secured or altogether neglected by State legislation. Any necessary legislation to deal with trusts and combines would be passed when required to cope adequately with them. But the greater part of the State laws would not be affected at all: it was not the intention of the Commonwealth to trespass upon the domain of the States but to operate effectively in a sphere in which the States could not by reason of geographical limitations and circumstances operate effectively and unaided. Steps would be taken to supplement States Wages Boards and States Tribunals, but not to supersede them. The States would still retain great and important powers, including land and settlement development and protection of natural resources, roads, forests, mines, water conservation and irrigation, education, public health, social relations, criminal law generally, civil law generally, contracts, torts, real and personal property, etc., liquor and licensing, State constitution and government, municipal and local government, State railways, State works and undertakings, State taxation, State insurance, State banking, administration of justice and legal procedure, police, etc.

On the other hand Mr. Deakin headed a vigorous campaign against the bills as calculated to destroy the authority of the States, and at the referenda on April 26, 1911, both bills were conclusively defeated by large majorities in every State save Western Australia, in which both were carried.

The Validity of the Doctrine of Reserved Powers.—It is far from easy to predict the future of the doctrine of implied prohibition, for if the three senior judges of the High Court are fully convinced of the principle which they have adopted from the first as the basis of the consideration of the Constitution, the two junior judges are evidently, if in different degrees, quite unwilling to admit its validity, and they have declared in open court that they do not consider themselves bound by it.[1] This dictum has been criticised somewhat severely in Australia as a sign of lack of judicial temper and as reflecting the political views of those responsible for it. The Chief Justice as early as 1907 protested against the possibility of such a doctrine in the case of *Baxter* v. *Commissioners of Taxation, New South Wales*.[2] "There must," he said, "be some finality in the decisions of this Court, especially on constitutional questions, unless the decision in any particular case is to depend on the accidental constitution of the Bench in that case. There may be cases in which the Court ought to review a previous decision, but a mere change in the constitution of the Bench ought not to be regarded as sufficient reason for doing so. The danger of such a doctrine has been the subject of much comment in the United States." But unhappily the force of this argument is greatly lessened by the fact that the two judges who reject the doctrine of the binding character of the judgments asserting the rule of implied prohibition can rest themselves on the authority of the Privy Council, which in *Webb* v. *Outtrim*[3] declared its refusal to accept that

[1] Harrison Moore, *Commonwealth of Australia*, 2nd ed. p. 622.
[2] 4 C.L.R. 1087, at p. 1120. [3] [1907] A.C. 81.

doctrine as at all applicable to the case of the Commonwealth and the States. Higgins J., in *Baxter's Case*,[1] declared that in his opinion the judgment of the Privy Council in *Webb* v. *Outtrim* was binding on the High Court. He admitted that the High Court could in virtue of s. 74 of the Constitution prevent an appeal being carried to the Privy Council on a matter which involved the relations of the Commonwealth and the States, or of the States *inter se*; but if the Privy Council dealt with such a question as it then could do by reason of an appeal from a State Court in the exercise of federal jurisdiction, then the decision of the Privy Council as that of a Court on a higher plane than the High Court should be followed. Isaacs J.[2] in that case arrived at a contrary conclusion: he was of opinion that the clear intention of s. 74 of the Constitution was to entitle the High Court to come to its own decisions regarding such cases, and he held that the Court were entitled to disregard the judgment in *Webb* v. *Outtrim*. But in a later case [3] he expressly limited this view to an assertion that the decisions of the High Court in such cases were final: he declared that in his opinion the Court were bound in deciding a case to follow the general principles of interpretation laid down by the Privy Council, and therefore to disregard the doctrine of implied prohibition. This is not inconsistent with his previous utterances; for even when supporting the doctrine of *McCulloch* v. *Maryland* in its application to interference with Commonwealth agencies, he was careful to observe that the doctrine had been carried too far in later cases, partly in consequence of the fact that in the United States the Court alone had power to annul a statute passed by a State legislature.

It is impossible, therefore, to regard the dispute as finished, or to deny that much may turn on the next appointment to the judicial bench and the accidents of time. The two opinions are not easily to be reconciled, and the whole interpretation of the Constitution must seriously vary according as one or the other predominates. Neither theory can be dismissed as in the slightest degree unreasonable. The opinion of the senior judges is based on a profound study of the law of the federation of the United States, cases of the federal High Court forming the substance of their judgments,[4] and their principle of decision is based on the theory that Australia, for all purposes save foreign relations, must be looked upon as a federated State. If that assumption is correct, and it involves the conception of the Empire as for all ordinary purposes a number of bodies connected only by having the same sovereign, then the judgments of the High Court appear not to be open to criticism. The Court becomes, as in the United States, the guardian of the Constitution, and its clear duty is so to assert the limits of the powers of both Commonwealth and State

[1] 4 C.L.R. 1087, at pp. 1162, 1163. [2] 4 C.L.R. 1087, at p. 1153.
[3] 8 C.L.R. 330, at p. 390.
[4] See 1 C.L.R. 91, at p. 112; 1 C.L.R. 208, at pp. 237, 240; 4 C.L.R. 1087, at pp. 1122, *seq.*; 8 C.L.R. 115, at p. 120.

as to effect the separation of authorities and the maintenance of a balance of power such as may be assumed to have been aimed at by the contracting[1] parties when the States entered federation. Nor in a narrower point of view is their view open to the somewhat sharp criticism directed against it by the Judicial Committee,[2] which appears to consider that they have assumed the right to annul statutes because, though within the legal powers of the State legislatures, they are contrary to the tone and spirit of the institutions of the country. In *Baxter's Case*[3] the Court properly repudiated the charge, and pointed out that all they had done was to apply the principles of the Colonial Laws Validity Act, 1865, to the conflict of State and federal powers under the Constitution, which is embodied in an Imperial Act of Parliament.

The theory nevertheless seems to break down when confronted with the salient fact that the Commonwealth is after all not an independent State and that its sovereignty, like that of the States, is only a relative term. The argument from the Imperial connection can be put in several forms, and all of them have weight. In the first place it may be pointed out, as was done as early as the case of *D'Emden* v. *Pedder*,[4] that the Royal power of veto in its various forms must be remembered. The Chief Justice in that case declined to consider the argument as relevant, and in *Baxter's Case*[5] he insisted on the unsoundness of the view that the power of veto matters. He pointed out that in the case of existing State Acts disallowance was impossible, and that the obligation of reservation was exercised by the governor of a State in accordance with the advice of Ministers, and would therefore be no protection to the Commonwealth. In the case of disallowance the power of veto could not be effectively used. It would require that both the Commonwealth and the States should scrutinise the Acts passed by the legislature of the other to ascertain their validity, and should make representations to the home Government on the subject, and the home Government would require to appoint a new department to advise the Minister with regard to the Acts passed by the Commonwealth and the States. The action of the home Government would be an intolerable restriction on the freedom enjoyed by the Australian colonies, and if this was what Australia had gained by federation it had indeed asked for bread and had received a stone. The case of Canada was quite different, because there the provincial Acts could be disallowed by the Governor-General in Council, and thus the power of veto could be so used as to render it unnecessary for the Courts to intervene with the doctrine of implied prohibition.

[1] For the Constitution as a contract, cf. 3 C.L.R. at p. 539; 4 C.L.R. at pp. 1109, 1113.

[2] [1907] A.C. 81, at p. 88.

[3] 4 C.L.R. 1087, at pp. 1123 *seq.*

[4] 1 C.L.R. 91, at p. 100. Cf. *Bank of Toronto* v. *Lambe*, 12 App. Cas. 575, at p. 587, *per* Lord Hobhouse.

[5] 4 C.L.R. 1087, at pp. 1126 *seq.*

Excellent as the argument of the Chief Justice is from a political point of view, it may be doubted whether it is equally effective as a legal argument. In the case of the United States the absence of any power in the federal Government to disallow any State Act has lead naturally to the control of State legislation by the Courts, which have similarly had to intervene to secure the States in the exercise of the powers which the Constitution purports to confer upon them. It is certain that in the case of Canada the Courts have not found it necessary to lay any substantial stress on the doctrine of *McCulloch* v. *Maryland*,[1] and indeed the Supreme Court of Canada had recently reversed the decision in *Leprohon* v. *Ottawa*,[2] which was the chief instance of a judgment in Canada based on the principles adopted by Chief Justice Marshall. The federal Government in Canada has always felt able to prevent any abuse of provincial authority by disallowance of Acts, and indeed it is now recognised by the Dominion Government that the only real justification of disallowance is interference with federal interests, as for example in the case of the repeated attempts of British Columbia to adopt Asiatic exclusion laws contrary to the declared policy of the Dominion Government. Invasion of provincial rights by the Dominion legislation has been prevented by the Courts by decisions based on the ordinary interpretation of the British North America Act, without the adoption of any doctrine similar to those of the immunity of federal or State instrumentalities or of implied prohibitions. It is true that in the case of the Commonwealth the federal Government has not the power to disallow State Acts, but in law that hardly makes any difference, for the power exists, and is to be exercised by the Imperial Government. The Chief Justice[3] asserted that it would require a new department to advise as to the disallowance of Acts, and that the Royal power of disallowance has not been exercised in the past on such grounds. But these arguments are hardly very cogent. There is no obvious reason why the Colonial Secretary should not carry out the duty of advising the Crown as to the Acts which should be disallowed, and it is quite certain that the fact that an Act was *ultra vires* has often in the case of the enactments of unitary legislatures been the ground for disallowance; it is not out of place to point out that the only Australian Bill which after passing Parliament has failed to become an Act by reason of the withholding of the Royal assent was an Act for giving a preference to British goods if imported in ships employing only white labour, which contravened several treaties binding the Commonwealth.[4] Of course there would be no question of disallowing an Act save on grave grounds, but the Commonwealth would

[1] 4 Wheat. 316.

[2] 2 O.A.R. 522, reversed in *Abbott* v. *City of St. John*, 40 S.C.R. 597.

[3] 4 C.L.R. 1087, at p. 1132.

[4] Such an Act is not of course technically *ultra vires*, but it is comparable as an instance of restraint on a legislature because it is not—in this case internationally—free to act as it wishes.

never have any difficulty in securing the disallowance of a State Act, if passed, which really attacked the operation of the Commonwealth legislative or executive power, and, that being so, it is very difficult to see any substantial difference between the case of the Commonwealth and of Canada, which the Chief Justice desired to regard as quite different. It is perfectly reasonable, therefore, to assume that the purpose of the Commonwealth Constitution Act was like that of the British North America Act, to set up two legislatures, federal and State, whose powers should be those accorded in the Act according to the ordinary interpretation of British Acts, leaving it to the power of veto and the remedial action of Imperial legislation to remove any grave anomalies which might arise in practice in the working of the Act.

This is the conclusion suggested by the second form of the argument based on the Imperial connection, that from the control of the Judicial Committee of the Privy Council. It is of course beyond question that the Privy Council is in all but the class of cases which involves issues between the Commonwealth and the States or the States *inter se* a superior Court to the High Court of Australia, and though the Privy Council has formally laid down the reluctance with which it will grant leave to appeal from decisions of so august a tribunal as the High Court of the Commonwealth, it has not hesitated in several recent cases to reverse the judgments of the High Court.[1] It is, however, apparently claimed by the majority of the High Court that that Court is a Court of final appeal in the cases in which under the Constitution no appeal is possible from their decisions save by their own leave, and that the principles enunciated by the High Court in such cases are of binding force even when they conflict with the principles which the Privy Council has laid down in analogous matters. Higgins J.[2] dissents from this view, and holds that in all cases the judgments of the Privy Council bind the High Court, and Isaacs J.[3] holds that the principles of general interpretation laid down by the Privy Council bind the High Court. But apart from this issue it is important to observe that the judgments of the Privy Council in the case of the Commonwealth would evidently have been based on the model of those which it adopts in the case of Canada, and which do not rest on the basis of either the immunity of instrumentalities or implied prohibitions. With all the deference due to the majority of the High Court, it is hardly possible to consider them better qualified to interpret an English statute—for after all the Constitution is no more in law than that—than the Judicial Committee of the Privy Council. Moreover, the actual judgments of the Privy Council in the case of Canada have certainly stood the test of time admirably, and the common-sense of their decision in the case of *Webb* v. *Outtrim*[4] was sufficiently proved by the fact that the Commonwealth Parliament hastily

[1] See, e.g., *Blake* v. *Bayne*, [1908] A.C. 371.
[2] 4 C.L.R. 1087, at pp. 1162, 1163.
8 C.L.R. 330, at p. 390.
[1907] A.C. 81.

passed an Act to permit the taxation of official salaries by State Parliaments, though the Act could not possibly be valid if the High Court were right in thinking that the Constitution forbade such legislation.[1]

Nor if the cases in which the doctrine has been invoked are studied does it seem clear that the new principles of interpretation have proved of much importance. The immunity of a Commonwealth officer from giving a stamped receipt for his salary was hardly worth the enunciation of the principle of the immunity of Commonwealth instrumentalities, while the more important question of the immunity of such officers from taxation had very hastily to be revoked. It is not exactly apparent what advantage has been derived by the decision that the employees of a State railway are excluded from the benefits of the Commonwealth Conciliation and Arbitration Act, which was passed under a power expressly conferred in order to allow of the formation of a Court which could deal with industrial disputes extending beyond the limits of a single State, and thus had a wider sphere of action than any State Court could have. The Court itself found it necessary to throw overboard the doctrine of the immunity of instrumentalities when it came to the claim that the State could import steel rails for its railways free of duty, or could buy wire-netting and import it free of duty and sell it to its farmers. Yet there can hardly be said to have been any more conclusive reason in favour of abandoning the doctrine there than in cases where it was adhered to. Isaacs J. seems still to cling to the view that the immunity of instrumentalities is important for the Commonwealth, but the position is open to grave doubt, and it would seem that all the doctrine can do would be more easily effected by the right of the Commonwealth to ask for the disallowance of any law which was aimed at impeding the Commonwealth—in fairness to the States it should be said that no such law has yet been passed—or by the amendment of the Constitution, a quite feasible and not very slow operation. It appears very doubtful whether the doctrine of the immunity of instrumentalities is any more legitimate than that of implied prohibition which Isaacs J., like Higgins J., condemns.

That doctrine likewise is not particularly valuable if it may be judged by its results. It has succeeded in destroying Part VII. of the Commonwealth Trade-Marks Act, but it can hardly be felt that that decision was a favourable example of its operations. It seems perfectly clear that the term "trade-mark" was interpreted unnecessarily narrowly by the Court under the influence of the doctrine that the State must not be deprived of any legislative authority unless there was express warrant for it in the Constitution. No one would in the slightest have wondered had a workers' trade-mark been provided for in the Trade Mark Act of a unitary legislature, for, to tell the truth, there can be little doubt that such a trade-mark is in essence a real trade-mark, if not exactly a trade-mark in the narrower sense of English

[1] Cf. 1907 4 C.L.R. 1178, at p. 1194, *per* Higgins J. See *Journ. Soc. Comp. Leg.* ix. 279.

law, though, as was pointed out in the course of the case, that law is constantly changing, and very possibly a workers' trade-mark may some day be added to the categories now existing. The natural interpretation of the power would certainly have been to consider whether, generally speaking, the new trade-mark was reasonably so called and to admit the validity of the Act; the actual procedure of the majority of the Court will certainly severely restrict the power of the Commonwealth to legislate, and will no doubt lead to one of those constitutional amendments which are in some ways objectionable and inconvenient.

Much more important, of course, is the case of the excise tariff, which was intended to secure the adoption of the new protection, and which is of special interest, as the case was of course invoked in the struggle over the land taxes, which are being introduced avowedly to aid in the breaking up of the large estates and the settling of people on the land. It is perfectly easy to sympathise with the feeling that the Commonwealth was thus engrossing powers of internal regulation of wages and hours, which were really matters for State action, and it was not unnatural that the doctrine of implied prohibition was promptly applied to the case. It may indeed be conceded that if the purpose was deemed to be a desirable one—and it was, of course, the complement of the customs tariff—the proper plan was to secure the amendment of the Constitution to allow the Commonwealth to control industrial matters throughout the Commonwealth. But apart from these considerations, which are considerations of politics, could it be held that the Act was *ultra vires*? It made, as was pointed out, no attempt to regulate hours of work or wages directly, but offered rebates to those who in their operations paid certain scales of wages and conformed with certain general conditions.[1] If the Act was to be held *ultra vires* it could much better have been so held on the ground that it was merely a sham Excise Act—but this would have been hard to prove, for the excise was meant to be levied, and would have been levied in many cases—or on the more technical grounds, which were alleged against it with some force, that it authorised discrimination between States, and that it contained other than matters of excise contrary to s. 55 of the Constitution. But on the whole it does seem that the Act, though probably ill-advised, was legal, and that the minority of the Court were more nearly in the right than the majority. It will be of great interest to compare when available the judgment recently delivered on the question of the land tax. There the case for the Commonwealth was, however, much stronger than in the excise case, for the Act itself did not contain any indications of its purpose beyond the fact that the scale of taxation shows that it is aimed at absentees and large holders, who might, however, on mere

[1] The American case of *Veazie Bank* v. *Fenno* (8 Wallace 548), where a prohibitive tax on State bank-note circulation was upheld, tells in favour of the legality of the Excise Tariff, 1906. A similar tax is proposed in a Bill now before the Commonwealth Parliament.

revenue grounds be specially heavily taxed. It may be added that Higgins J. had in advance, in the course of a judgment, declared in favour of the validity of such a tax, whatever its motive may be, and this view seems to have been shared by all the justices.

Nor in the case of the Australian Industries Preservation Act, 1906, does the judgment of the majority of the Court seem very convincing. The power of the Commonwealth to legislate with regard to foreign corporations and trading and financial companies formed under State laws is no doubt not an unlimited one, but the particular exercise of the power to which exception was taken, the prohibition of such companies or corporations forming monopolies or conspiracies in trading matters, seems an exercise of power which it is peculiarly probable that the Commonwealth Parliament was meant to have. It is notorious that in Australia certain great foreign corporations are believed to have, or to desire to secure, a hold such as to defeat other competition, and only a federal law, it is clear from the experience of the United States, could successfully deal with such corporations. If the matter were left to State activities, probably the whole end of prohibition would be defeated by the action of one State, just as Tasmania supports Tattersall's after its exclusion from the rest of the Commonwealth. No doubt the interpretation of the full ambit of the power of the Commonwealth regarding such corporations would be difficult, but it is hard to think that it was in any way *ultra vires* to forbid corporations to monopolise trade. Moreover, if this power is not vested in the Commonwealth, it is clearly one which must, in the public interest, be so vested.

The attempts to set bounds to the action of the Conciliation and Arbitration Court have clearly been unfortunate; it is difficult not to feel that the attempt was a mistaken one. The desire to preserve the control of the State over conditions of labour is natural, but the Constitution recognised that the need of the time was to permit of the establishment of a tribunal with power to settle such disputes as were not merely confined to one State, and the minority in the cases in question had no difficulty in showing that to deny the power exercised by the Court would be absolutely to hamper its effectiveness for the prevention or settlement of disputes extending beyond the limits of a single State. To accept the decision of the Court would really be to permit the States to thwart, if they so desired, the operation of a Court legitimately set up and endowed with authority by the Commonwealth Parliament for a definite purpose which *ex hypothesi* it was not within the powers of any State to effect.

The Taxation of Federal and State Property.—S. 114 of the Constitution forbids the taxation of the property of the States by the Commonwealth or of the Commonwealth by the States, and its interpretation has given rise to serious difficulties. It was sought in the case of *D'Emden* v. *Pedder*[1] to make out that the taxation of a receipt for the salary of a Commonwealth

[1] 1 C.L.R. 91, especially p. 108.

officer under a State law was the taxation of the property of the Commonwealth, but the attempt was rejected by the Court on the ground that, though the receipt was no doubt the property of the Commonwealth, say for a prosecution for stealing, still it was not property of the kind contemplated in the section which referred to property on which as property taxation was imposed. In the case of *The Municipal Council of Sydney* v. *The Commonwealth*[1] it was claimed that the levying of rates by a town council on Commonwealth property was not really taxation at all, or, if it was taxation, the section of the Constitution only referred to legislation subsequent to the Constitution, as the words used were "shall not impose." Both contentions were rejected by the High Court, which pointed out that the taxation by a State covered beyond doubt taxation by a municipality under State authority, and that the term "impose" covered the levying and collecting of the tax in question.

Much more serious difficulties arise in connection with the cases of the levying of customs duties on steel rails imported by the State of New South Wales.[2] In the ordinary sense of the word "property" these goods were beyond question the property of New South Wales, and the Court was divided in opinion as to the manner in which the difficulty was to be surmounted. Ultimately the majority of the Court decided that the levying of duties of customs was not really a levying of a tax on property, but was a tax on the introduction of property, which was a different thing from property. This decision did not commend itself to Isaacs J.,[3] who showed that in point of law there could be no real doubt that the levying of customs duties was a tax on property, not on importation, but he held that the word "tax" in s. 114 must be read so as not to refer to taxation in the shape of customs duties. Nor can there be much doubt as to the soundness of his view: the words of the clause are clearly dangerously vague, and some definite meaning must be assigned to them to render them capable of being read into consistency with the other provisions of the Constitution.

The existence in the Constitution of s. 114 formed the subject of difference of opinion between the High Court and the Privy Council in the cases of *Baxter* v. *Commissioners of Taxation, New South Wales*,[4] and *Webb* v. *Deakin*.[5] The Privy Council, in rejecting the doctrine of implied prohibition, instanced the protection to the property of the Commonwealth given by the section, and quoted the maxim, *expressum facit cessare tacitum*. If the Constitution expressly made provision for non-interference in one case, it must be held to allow it in others. The reply of the High Court to this criticism was to insist that the section was due to a desire to avoid an

[1] 1 C.L.R. 208.

[2] *Attorney-General of New South Wales* v. *Collector of Customs for New South Wales*, (1907) 5 C.L.R. 818.

[3] 5 C.L.R. 818, at pp. 844 *seq.*

[4] 4 C.L.R. 1087, at pp. 1126 *seq.*, *per* Griffiths C.J.

[5] [1907] A.C. 81.

convenience which had resulted from the interpretation of the United ates Constitution. It had been held in various cases that there was a stinction between property held by the Government for Governmental rposes proper and land or property held by it as an investment or in nnection with a trade, and this distinction of treatment the Commonwealth nstitution sought to avoid by using the generic term "property" and tting in a general prohibition of taxation. They added that the expression *pressum facit*, etc., had often been invoked in vain in English Courts. e, for example, *Colquhoun* v. *Brooks*,[1] where Lopes L.J. called it a valuable rvant but a dangerous master.

The explanation of the High Court is ingenious, but probably over-ttle; at any rate, other parts of the Constitution hardly show so refined a owledge of the American constitutional cases as that revealed by the High urt. Moreover, some doubt is thrown on the validity of the argument by e additional reason given for its validity, viz. that the doctrine of necessary plication had been applied to the Constitutions of the British Dependencies the case of Crown Colonies as in the cases *In re Adam*[2] and *Attorney-neral for Canada* v. *Cain and Gilhula*.[3] But these cases merely establish doctrine that whatever power is given to a legislature it will have such cessory power as is necessary to enable it to carry the power granted into fect, and in particular that deportation of a prohibited immigrant or of an en is legitimate, though it contravenes the general rule that a Colony only gislates for territorial limits—a rule which, it may be added, is with but few ceptions not even formally expressed in the constitutions of the Colonies. ow such a doctrine can be deemed to help the doctrine expressed by the igh Court it is quite impossible to see.

Discrimination between States.—In the cases of *The King* v. *Barger*[4] d *The Commonwealth* v. *McKay*, one of the grounds on which the Excise riff, 1906, was impeached was that the Act, though otherwise valid, was valid on the ground that it discriminated between States and parts of ates, contrary to the provisions of s. 51 (ii) and of s. 99 of the Constitution, hich provided that the Commonwealth should not in taxation discriminate tween States, and should not, by any law or regulation of trade, mmerce, or revenue, give any preference to one State or any part ereof over another State or any part thereof. The words "States parts of States" were according to the judgments of the majority the Court in that case to be read as synonymous with parts of e Commonwealth or different localities within the Commonwealth. The sting limits of the States were arbitrary, and it would be a strange ng if the Commonwealth Parliament could discriminate in a taxing t between one locality and another simply because such localities were t co-terminus with States or with parts of States. The proviso to the

[1] 21 Q.B.D. 52.
[2] 1 Moo. P.C. 460.
[3] [1906] A.C. 542.
[4] 6 C.L.R. 41.

Excise Tariff exempted from taxation under that tariff goods manufactured in any part of the Commonwealth under certain conditions as to the remuneration of labour. The first category was such conditions as were declared by resolution of both Houses of Parliament to be fair and reasonable, and if identical rules were made applicable to the whole Commonwealth no objection could be taken to it on the ground of discrimination. The second category of conditions included such as were in accordance with an industrial award under the Commonwealth Conciliation and Arbitration Act, 1904. Now that Act permitted the Court to make different rules for different localities. Similarly the third category included such conditions as were in accordance with the terms of an industrial agreement filed under that Act, and the conditions under such an agreement might vary from place to place. The fourth category was conditions declared to be reasonable by the President of the Commonwealth Court of Conciliation and Arbitration, or by a Judge of the Supreme Court of the State, or by any persons composing a State industrial authority. There might be as many different sets of conditions as there were judges and such industrial authorities. The Act must therefore clearly be held to discriminate between States and parts of States, and if there were no other objections to the Act it would be invalid as transgressing the provisions of s. 51 (ii) and s. 99 of the Constitution. It might be said that the conditions which allowed discrimination should be rejected and the others enforced; but that would be to make a new law, not to enforce the old one.

On the other hand Isaacs J.[1] declined to accept this reasoning. He quoted the American cases known as the *Head Money Cases*,[2] which showed that in the American Constitution the uniformity of excise provided for in Art. I, s. 8, cl. 1 of the Constitution meant geographical uniformity, and not intrinsic uniformity. He admitted that if the American form had been adopted by the Commonwealth, then it would have been necessary that every taxing Act should operate on the Commonwealth with the same force upon the same articles, but in the Commonwealth Constitution, while by s. 88 uniformity of customs duties was required, in s. 51 (ii) it was not required that legislation should be uniform, but only such as not to discriminate between States and parts of States. Moreover, the expression used was not between parts of the Commonwealth, but States and parts of States, which led naturally to the assumption that the prohibition to the federal Parliament was against differentiating in the question of taxation between States and parts of States, because they were particular States and parts of States. This view was confirmed in his opinion by s. 99 of the Constitution. On this interpretation there was no possibility of objecting to the Excise Tariff of 1906, because there was no discrimination in it for or against any part of Australia merely because it was a particular State, in contradistinction to any other State

[1] 6 C.L.R. 41, at pp. 105 *seq.* [2] 112 U.S. 580.

States, or because it was a particular part of a State in contradistinction any other part of the same State or to any other State. He could not ree that the Commonwealth Conciliation and Arbitration Act, 1904, in y way showed partiality between States and parts of States.

Higgins J.[1] also rejected the view that Parliament was discriminating tween States or parts of States. The Act made no discrimination between, r example, Queensland and Western Australia. Every manufacturer could t exemption under the Act. The Parliament did not discriminate between ates when it applied the same rule to all the States, even if some of the eans of exemption were not for the time in fact applicable in all the ates. In support of this view he quoted the case of the *Colonial Sugar efining Company* v. *Irving*.[2] In that case, which was decided by the ivy Council in 1906, the Commonwealth Excise Tariff, 1902, allowed an emption in the case of goods on which customs or excise duty had en paid under State legislation before the imposition of the Common- ealth duties. In Queensland there had been no State excise duty, and was urged on behalf of the sugar manufacture in Queensland that the cise tariff discriminated between Queensland manufactures while manu- ctures in other States were exempted. The argument was overruled the Judicial Committee, who said,[3] "The rule laid down by the Act is general one applicable to all the States alike, and the fact that it operates nequally in the several States arises not from anything done by the Parlia- ent, but from the inequality of the duties imposed by the States them- lves." He did not think that the Act authorised discrimination between ates or parts of States; it was true that different authorities were set up, it it must be assumed that these authorities in the exercise of their legated power would not attempt to discriminate.

In the case of *Davies and Jones* v. *The State of Western Australia*,[4] the uestion was raised as to the meaning of s. 117 of the Commonwealth onstitution, which provides: "A subject of the Queen resident in any ate shall not be subject in any other State to any disability or discrimination hich would not be equally applicable to him if he were a subject of the ueen resident in such other State."

S. 86 of the Western Australia Administration Act, 1903, provided that so far as beneficial interests passed on death to persons *bona fide* residents and domiciled in Western Australia, and occupying towards the deceased rtain relationships, duties should be calculated so as to charge only half the percentage on the property acquired by such persons. Under the Act e executors of the will of Davies were called upon to pay succession duty Western Australia, including a sum of 9 per cent. on an amount of 8,055, representing the value of the property which passed under the will a British subject resident and domiciled in the State of Queensland. The

[1] 6 C.L.R. 41, at pp. 130 *seq.*
[2] [1906] A.C. 360.
[3] [1906] A.C. 360, at p. 367.
[4] (1904) 2 C.L.R. 29.

plaintiffs paid on protest the rate of 9 per cent., and they sought to recover the sum in virtue of s. 117 of the Constitution. The defendants contended that a privilege conferred on a particular class of residents was not a discrimination, and that the real discrimination was between persons domiciled in Western Australia and other persons, and not between persons resident in Western Australia and persons resident in other States. They also contended that if the Western Australia Act offended against the Constitution it was the proviso reducing the rate payable to 4½ per cent. in the case of persons domiciled in Western Australia which must be rejected, and not the main rule. The Court, however, held that the latter contention could not be borne out, for it would enable the State Governments in effect to override the provisions of the Constitution by exercising through executive action the dispensing power. The only proper mode of construing the clause, if it really did discriminate, was to grant residents of other States the privileges formally given to residents of Western Australia. With regard to the other contention, the Court held that the real point of the discrimination was domicile and not residence. Griffith C.J.[1] pointed out that State Succession Acts could levy duty in the case of persons domiciled in a State on their personal property, wherever situated, and therefore it was not unreasonable for a State to levy a lower rate of taxation on domiciled persons, so that it was fair to conclude that the term "domicile" which was used in the Act was intended to bear its full technical meaning, and as it was right to interpret the Act so as, if possible, to make it consistent with the Constitution, it would be proper to interpret the Act as basing the difference of treatment on domicile. Barton J.[2] expressed the same view, and stated that it was discrimination on the sole ground of residence outside the State which was forbidden by s. 117, and the same view was accepted by O'Connor J.

S. 117 of the Constitution was also considered in the case of *Lee Fay* v. *Vincent*,[3] decided in 1908. The case arose from a prosecution in a Court of Petty Sessions for a breach of the provisions of the Western Australian Factories Act, 1904, which provided in s. 46 that no person of the Chinese or other Asiatic race should be employed in a factory unless he satisfied the inspector that he was so employed or engaged on or immediately before November 1, 1903. On the hearing it appeared that immediately before that date the Chinese in question, being then a naturalised British subject resident in the State of Victoria, was engaged in a factory in that State. Two questions were raised: (1) That on these facts the Chinese in question was brought within the exemption, it being contended that the word "factory," as used in the exemption, included factories outside Western Australia; and (2) that if it did not the provision was invalid under the Constitution. The magistrate convicted the appellant, who appealed by way

[1] 2 C.L.R. 29, at pp. 37 *seq.*
[2] 2 C.L.R. 29, at pp. 44 *seq.*
[3] (1908) 7 C.L.R. 389.

of a case stated to the Supreme Court. The Supreme Court of Western Australia, under misapprehension as to the effect of the Judicature Act, 1907, transferred the case to the High Court under that Act.

The Court decided that the transfer had been made in error, inasmuch as no question as to the limits, *inter se*, of the powers of the Commonwealth and of the State were raised; but they treated the matter as a question reserved for the consideration of the High Court under s. 18 of the Judiciary Act, 1903, which permits the Supreme Court to refer the matter of jurisdiction for such consideration. They also decided that s. 117 merely applied to a person who, being resident in one State, was seeking to assert rights in another. In the present case the person in respect of whom the rights were asserted was a resident in the State of Western Australia, and therefore s. 117 had no application. The Court were unable to decide, except on appeal from the Supreme Court, the other point as to the meaning of s. 46 of the Factories Act, 1904, and they remitted the case to that Court for decision.

An analogous question arose on the case of *Fox* v. *Robbins*,[1] which originated in a case stated by the police magistrate of Western Australia, which was transferred to the High Court by the Supreme Court under s. 5 of the Judiciary Act, 1907, which transferred to the High Court all cases involving the rights of the Commonwealth and the States or of the States *inter se*. Robbins held only a licence to sell wine the product of fruit grown in Western Australia, which cost £2, but he actually sold to a customer wine the product of Victorian fruit, although he had no licence to do so, the licence for selling other than Western Australian wine costing £50. The sale of liquor without a licence was penalised by s. 39 of the Wines, Beer, and Spirits Sale Act, 1880. It was, however, held by the police magistrate that the licence which Robbins held covered the sale of Victorian wine, and the High Court affirmed this decision on the ground that the discrimination between licences for the sale of wines according as they were manufactured from fruit grown in one State or another was contrary to s. 92 of the Constitution, which provided that on the imposition of uniform duties of customs, trade commerce and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free. If the State Act were still to be treated as valid, the intention of that section of the Constitution would be utterly foiled.

Although, however, the Court were all agreed as to the invalidity of the provision of the Act, there was a curious difference of opinion as to the effect of its repugnance to the Constitution. Higgins J. thought that the result was that the licence to sell Western Australian wine covered the sale of any kind of wine, but that the licence was necessary. Isaacs J. held that the

[1] (1909) 8 C.L.R. 115. For an opinion by the Attorney-General of the Commonwealth as to the effect of this section in relation to the South Australian Fruit and Vegetable Protection Act, see Commonwealth *Parliamentary Papers*, 1909, No. 63.

whole scheme of licences became unworkable, and that no licence was necessary; while the Chief Justice declined to decide between the two opinions, inasmuch as the vendor was the holder of a licence to sell Western Australia wine, and on either theory not liable to a penalty. The Parliament of Western Australia conformed to the decision by removing the discrimination by the Licensing Act, 1911.

TOWN PLANNING IN ITALY.

[*Contributed by* R. E. Willcocks, Esq.]

During the Town Planning Conference held last October under the auspices of the Royal Institute of British Architects, Signor Cattaneo, an Italian advocate, read a scholarly paper entitled "Italian Legislation respecting the Planning of Building Areas." This paper has been published in the Transactions of the Town Planning Conference, an admirably edited volume containing much valuable information as regards town planning in this and other countries.

Signor Cattaneo commences his article by stating that the Italian law regulating the planning of building areas in Italy is contained in the Act of the Italian Parliament of June 25, 1865, No. 2359. This Act has never been amended or modified, although it has been in force for nearly half a century. It will be noticed by referring to the article on Town Planning in the last number of the *Journal of the Society of Comparative Legislation* that the principle of regulating the building and laying out of towns by statute was introduced into Italy about nine years before any similar legislation was begun by any other country.[1]

Signor Cattaneo proceeds to point out that there are but few clauses in the Italian Act of 1865 dealing with the laying out of building areas and their extensions. Communal towns the population of which exceeds 100,000 are permitted to draw up a general scheme indicating the street lines which are to be followed in the event of portions of the town having to be rebuilt for the purposes of public health and for facilitating proper intercommunication. He also refers to those communes which are under the necessity of increasing their inhabited area, and in these cases a general plan must, as in the case of communal towns with a population of 100,000 or over, above referred to, be followed; and in order to carry out this plan the communal (*i.e.* the local) authority must construct the necessary roads, and for this purpose the owners affected have to cede the land required.

As regards the preparation and approval (by the Central Government)

[1] Cf. Swedish Building Law for Towns Act, 1874 (Part II.); Orange River Free State Townships Act (1874); Prussian Town Planning Act (1875); Transvaal Act, No. 34 (1908); British Housing, Town Planning, etc., Act, 1909 (Part II.); the Orange River Colony Township Act (1909), which repealed the Orange River Free State Township Act, 1874.

of town planning schemes[1] the Italian law lays down no special regulations as to procedure for adoption of a general town planning scheme or as to how the matter of compensation[2] for land compulsorily taken for the purpose of putting the town planning scheme into execution is to be determined. The general scheme, which is drawn up by the municipal authority and approved by the Government, has to be publicly exhibited, so that any persons affected may, if they desire, object.[3] These objections are laid before the central State authority by the local authority.[4]

The author then points out that in Italy the central State authority is the only body that can order the execution of a town planning scheme, and to effect this there are three modes of procedure:

(1) By special Act of Parliament.[5]

(2) By a Royal Decree.

(3) By a Decree of the Prefecture.

He next deals with the first of these methods, the special Act of Parliament, at great length. He is not satisfied that this method is productive of good results. He draws attention to the fact that a special Act is only necessary when the carrying out of a scheme entails the levying of a contribution from the owners of lands adjoining or contiguous to the scheme in the event of the value of such adjoining or contiguous lands increasing in value.[6] For if new streets are made it is necessary at the same time to provide a proper water supply and sewage facilities and other similar necessaries, and in consequence the land of adjoining and contiguous proprietors is greatly enhanced in value.

The author justly remarks that Parliament is not always in a position to adjudicate fairly upon such questions, for it cannot be expected to know the especial requirements of a distant town. The necessary formalities, previous to a Bill being introduced and carried through Parliament, are very much more lengthy and elaborate than if a Royal Decree were all that was necessary.[7] He proceeds to deal at length with the law relating to the amount of indemnity to be paid in respect of the expropriation of property. By the Act of 1865, if the whole property be compulsorily taken, an indemnity equal to the price that would ordinarily have been obtained must be paid to the expropriatee by the local authority. In the event of only a portion of the property being taken "the amount of the

[1] Cf. Part II. of Town Planning in the last Journal of the Society.

[2] Cf. British Act (1909), s. 58.

[3] Cf. British Act (1909), s. 54 (4), and Local Government Board Regulations, May 3, 1910, Art. 10.

[4] Cf. British Act (1909), s. 54 (2). Cf. New Zealand Act (1908), s. 16. Cf. Swedish Act (1874), Part II. s. 10.

[5] Cf. British Act (1909), s 54 (5).

[6] Cf. British Act (1909), s. 58 (3).

[7] Special Acts based upon the Act of 1865 were passed for the city of Naples on January 15, 1865, and for the city of Rome on July 20, 1890, July 7, 1902, and July 11, 1907.

indemnity is to be assessed at the difference between the estimated value of the property as a whole in its original state and the estimated value of the residue when the expropriated portion has been duly annexed." But, as the Act contemplated the fact that these improvements would benefit the unannexed property, there is a direction that in such case the indemnity shall be reduced by the estimated value of the benefit accruing. In the event of the benefit being assessed at a greater sum than the value of a quarter of the indemnity, the expropriatee shall be allowed to sell the whole property to the expropriator at a reasonable and just price. The author points out that although in theory these provisions are just, in practice they are not so. As to this portion of the Act there has been very much controversy, and the procedure is in consequence uncertain. In conclusion he deals with the Acts applicable to Rome and Naples, which as they are in the nature of "private" Acts do not come within the scope of this Journal.

Signor Cattaneo considers that the Act of 1868 requires immediate revision, as, in his opinion, the local authorities do not obtain a fair share of the benefits which result from their planning of building areas.

FURTHER NOTES ON LAND TAXATION IN ENGLAND.

PART II.

[*Contributed by* WALLWYN P. B. SHEPHEARD, ESQ., M.A.]

Anglo-Saxon Period.—When Britain ceased to be a Roman province the Roman imposts by right of conquest, of which a sketch has been given in a previous article, no longer prevailed. The departure of the Romans was followed by such a dissolution of ordered government as to amount to practical anarchy, and during this period no regular authority existed for the collection of revenue. The ancient historian Gildas represents the Britons after the withdrawal of Roman government as "a lawless, disorderly, abandoned rabble; slaughtered by the Scots and Picts almost without resistance; and slaughtering one another as soon as these common enemies retired."

The Laws of the Anglo-Saxon Kings.—After the arrival of the Saxons (A.D. 449) to the landing of William of Normandy (A.D. 1066), any insight into the taxation of Britain must be gathered from the ancient laws and institutes of England. The Anglo-Saxon law of property was, according to Pollock and Maitland's *History of English Law*, "customary and unwritten and no definite statement of it was to be found anywhere. . . . What modern lawyers called ownership of property, the *dominium* of the Roman system, was not recognised in early Germanic ideas. Possession, not ownership, was the leading conception: it was possession that had to be defended or recovered." This dominant conception of possession had its influence over the personal services and revenue available to the king for the purposes of protection of the community and maintenance of the royal dignity.

The collection of laws enacted by the Anglo-Saxon kings from Æthelbirht to Cnut, printed in 1840 by command of King William IV. under the direction of the Commissioners of the Public Records, contains laws by King Æthelbirht, King Alfred, and other Saxon kings, which show that in many cases the bōt or compensation for offences was as to some portion made payable to the king, and to this casual source some of his income must be attributed: "indeed," writes Maitland in his *Constitutional History of England*, "it is not until the very end of the Anglo-Saxon time that we

hear of anything that can be called a tax, not until it is necessary to pay tribute to the Danes."

The Royal Revenues.—The imposition of any special and extraordinary taxation was directed by the king with the counsel of the Witan. The regalia, or rights of royalty, are exhaustively enumerated in Kemble's *History of the Saxons in England*. The Anglo-Saxon king was only one of the people dependent upon their election for his royalty and upon their support for his maintenance. According to this history the king's life—wergild—was assessed like that of every other man at a fixed price, and was further guarded by an equal amount for cynebōt or price of royalty: the "wergild" belonged to the family, the "cynebōt" to the people. His personal rights or royalties consisted in the possession of large domains which went with the Crown, a sort of τέμενος, which were his own property only while he reigned and distinct from private estates he might purchase for himself. He also had the right to receive *naturalia*, or voluntary contributions in kind, from the free men. He received a portion of the fines payable for various offences, and the confiscated estates and chattels of offenders. The maintenance of the public peace was the first among many duties of the king, and he was empowered to levy fines for all illegal breaches of it by offences against life, property, or honour. Another source of income was the forfeiture to the king of all possessions, as by Ælfred's Witan was decreed, for the crime of treason. For fighting in the king's house forfeiture of all chattels was decreed by Ini: the charters supply numerous instances of forfeiture to the King of bóclands as well as chattels for criminal offences.

Offences against the State were punished by fines levied by the public officers to the king's use.

Buried gold, specie, and plate constituted treasure-trove which was the property of the king, and any concealment of treasure-trove was a grave offence, as it affected the person and dignity of the king.

Trinoda Necessitas.—In Stubb's *Constitutional History* the *trinoda necessitas* is stated to have been the three obligations of the fyrd, or military service; the repair of bridges; and the maintenance of fortifications: these obligations were incumbent on all free men and therefore on all holders of land. The duty of "burh-bōt" threw the burden of repairing the mural fortification on the land-owning townsmen and householders of the particular burh, or in some cases on the county. In the laws of King Æthelstan the thirteenth Ordinance is "that every burh be repaired xiv days over Rogation Days." "The pre-Conquest conveyances of land show"—so it is stated by Augustus Ballard, the author of *The Domesday Inquest*—"that the land was universally (except in a few instances by favour of the king) subject to the *trinoda necessitas*—the threefold burden of the repair of the boroughs, the repair of the bridges, and military service": the same author points out that "the lands assigned for the repair of any borough became the shire taking

its name from that borough. The Cheshire Domesday shows this connection between county and borough: 'To repair the wall of the city and the bridge the reeve ordered one man to come from every hide.' Sometimes the lords of properties in the shire kept houses in the city and burgesses in those houses to repair the wall. Such houses were called 'mural mansions.'" At Oxford the walls were maintained by the *mansiones murales*, which were therefore free from all taxes save the *trinoda necessitas*.

Power of Taxation.—In Kemble's summary of the powers of the Witenagemót the eighth canon was "the king and the Witan had power to levy taxes for the public service." The voluntary payments of freemen (*naturalia*) ultimately became compulsory: they were the cyninges gafol, payable on the hide, and possibly, writes Kemble, the cyninges utware and cyninges geban of the laws—the *contributions directes*—by which a man's station in society was often measured. In the time of Ini the Witan fixed this tax, or gafol, in barley at six pounds weight upon the hide.

Danegeld.—In the time of Æthelred the Witan authorised the levy of large sums to resist the Danes and for the maintenance of fleets. These payments became known as Danegeld. Three hundred hides of land provided a ship, and eight hides a helmet and coat-of-mail.

These Danegeld levies appear to have been the only cases on record of extraordinary imposts, and according to Stubbs' *Constitutional History* "the maintenance of the royal state was fully provided for by the proceeds of the royal farms and public lands, and all local requirements were met by the alodial obligations discharged by personal service."

It will thus be seen that the possession or occupation of land involved liability in the Roman period to the exaction of an uncertain rent either in money or in produce (*vectigalia*), and in the Anglo-Saxon period to the rendering of personal services to the king or the community, sometimes commuted into contributions in kind or money.

(*To be continued.*)

MACCHIAVELLI'S "PRINCE."

[*Contributed by* EDWARD MANSON, ESQ.]

The Problem it Presents.—*The Prince* of Macchiavelli is one of the "curiosities of literature." In it we have a man of first-rate ability sitting down to write a treatise on statecraft, deliberately recommending to princes—as it seems—a policy of falsehood, craft, cruelty, and dissimulation, counselling hypocrisy in the profession of religion, and holding up Cæsar Borgia—a name linked with a thousand crimes—as an ideal for imitation. Was it serious, this treatise, or was it a grave piece of irony, as Lord Bacon and others have thought, or was it a device for drawing despots to their own destruction by the very iniquity of its counsels, or was it a mere picture of the despot as Macchiavelli's age knew him; or is the theory developed in Macaulay's brilliant essay the true one, that civic life in mediæval Italy had created a type of character for which intellectual ability working dexterously to its end by craft, dissimulation, and intrigue had a charm lacking to the barbarian virtues of truth, honour, and plain dealing?

It is a great puzzle, and what makes the puzzle more perplexing—and piquant—is that this guide to the art of ruling tyrannically was written, not by an advocate of autocratic government like Hobbes, but by one who was at heart a zealous republican; for as to Macchiavelli's genuine sentiments there can be no question. Born of noble lineage under the reign of Lorenzo the Magnificent, he had, on the expulsion of the Medici from Florence in 1494, become, at twenty-nine, second Chancellor and Secretary to the Republic; had served Florence well and faithfully during the years of her freedom, had gone on many an embassy to foreign Courts, and only a few months before his treatise was composed had suffered imprisonment and the rack at the hands of the very tyrants whose policy he espouses. It is hardly from such a man that we expect a Praise of Tyrants. Yet common opinion has given him a unique place in History's "chamber of horrors"; and it would be difficult to find a man against whom the current of the world's moral judgment has run so strongly as Macchiavelli—a name more generally odious. "Macchiavellian" is a synonym for all that is darkest and most diabolical in the ways of statecraft. Macchiavelli is Iago transferred to the sphere of politics, "the attributes

of all arch-villains joined in him." He was "colour-blind," as one of his critics expresses it, to "commonplace morality."

But is this popular estimate of Macchiavelli correct? Is he really as black as he is painted, or is he censured only because he is not understood? It must be remembered that the charge against him of "moral obliquity" rests only on *The Prince*. His *History of Florence* is a sober and statesmanlike narrative. In his *Discourses on the First Decade of Livy* he extols the ancient Roman virtue, and dwells on the all-importance of religion to a State. His comedies are in the manner of Plautius—nothing worse. His letters breathe a frank and generous spirit—an indignation at all villainy. He is nobly censorious over the corruptions of the Church. In private life we see him a black-haired, bright-eyed man, light-hearted and sociable, mixing with the woodcutters on his little estate, fond of rural sports and a game of trictrac at the tavern, with nothing worse to his discredit than some passing amours. Nowhere can we discover the "wicked" Macchiavelli. *The Prince* is the "head and front of his offending." This book has been described as "an analysis of the methods whereby an ambitious man may rise to sovereign power." Such a description is very inadequate; for *The Prince* is in fact much more concerned with the methods by which such a man may preserve his power than how he may acquire it. But the capital defect of the description is that it passes by the political conditions of Macchiavelli's time. To judge a book we must familiarise ourselves with its environment; and this—which is true of all books—is peculiarly true of *The Prince*. It was the product of the age, and written to meet the conditions of that age.

The Age of the Despots.—John Addington Symonds, writing, with his accomplished pen, on the Renaissance in Italy, fixes hree epochs of mediæval Italian history—the twelfth and thirteenth centuries he calls the Age of the Free Burghs, the fourteenth and fifteenth the Age of the Despots, the sixteenth and seventeenth the Age of Foreign Enslavement. During this Age of the Despots all Italy to the north of the Apennines—Milan and Verona, Florence and Rome, Vicenza and Padua, Pisa and Lucca and Siena—the republics of Venice and Genoa alone excepted—were the battle-field of tyrants whose title was illegitimate—founded, that is to say, on no feudal principle, derived in no regular way from the empire, but held as a gift or extorted as a prize from the predominant parties in the great cities. Sometimes the tyrant was one who claimed from long seignorial possession; sometimes a noble who obtained the title of Vicar of the Empire, and on the basis of it built up an illegal power; sometimes a usurper who had been charged with military or judicial power; sometimes a successful leader of condottieri; sometimes the son or nephew of a Pope; sometimes a citizen of eminence.

If we examine (goes on Mr. Symonds) the constitution of these tyrannies we find abundant proof of their despotic nature. The succession from father to son

as always uncertain. Legitimacy of birth was hardly respected. . . . The sons Popes ranked with the proudest of aristocratic families. Nobility was less garded in the choice of a ruler than personal ability. Power once acquired was aintained by force, and the history of the ruling families is one long catalogue crimes. Yet the cities thus governed were orderly and prosperous. Police gulations were carefully established and maintained by governors whose interest was to rule a quiet State. Culture was widely diffused without regard to rank or ealth. Public edifices of colossal grandeur were multiplied.

Now this was the spectacle which Macchiavelli had before him when e composed his *Prince*. He was far from approving it—on the contrary, e held firmly by the view that a "democracy founded upon good laws the best of all governments." But there the situation was. The most owerful of the Italian cities had, in his own words, become "incapable f freedom." The ceaseless feuds and rivalries of great families, entrenched i their fortress-palaces or engaged with their retainers in daily brawls in ie streets—like the Montagues and the Capulets—the intrigues and con-piracies of ambitious and unscrupulous men—"insita mortalibus potentiæ upìdo"—faction and popular tumult, a deep-seated and widespread corrup-on of morals—all these things necessitated a ruler with a strong hand, the State was not to lapse into utter disorganisation and ruin. Despotism as a bad thing, but anarchy was a worse. This is Macchiavelli's view: and is the justification of his *Prince*. He reasons *politically*, that is according o the interest of the State, and thus reasoning the social condition appeared o him so desperate that salvation was only to be found in a tyrant. The early Greek States—two thousand years before—had been driven to the same emedy. Paris long afterwards welcomed the despotism of Napoleon to end he orgies of the Revolution. "I say then," he observes, "that a Prince, especially a new one, cannot possibly practise all those qualities which nake men esteemed good and virtuous. He will often be obliged, for he preservation of his State, to violate the laws of charity, humanity, and eligion, and therefore he should be prepared to shift his sails according o the wind that blows; and, as I said before, never to do evil if he can ielp it, but if he is compelled by downright necessity, to make no scruple of it."

> As he who stands upon a slippery place
> Makes nice of no vile hold to stay him up.

Here then is the key to *The Prince*—political necessity justifying calculated villainies—"the tyrant's plea—necessity." As Sallust says, "Omnia retinendæ dominationis honesta."

Oderint dum Metuant.—"Is it better," he asks later on, "to be loved or feared? To which I would answer that one would wish to be both, but if you have to choose it is *safer* to be feared than loved, because mankind as a rule are ungrateful, inconstant, hypocritical, and selfish." Cruelty, dissimulation, and fraud must therefore at times attend the tyrant's

rule; but as Macchiavelli viewed these they are not wanton or capricious —that is the important point—but aids to government—means to an end on the whole beneficent—"salus reipublicæ." Their necessity is the measure of their justification. There is all the difference in the world, for instance, between a Prince racking a Guido Fawkes to obtain discovery of an infernal plot against the State or against himself—"l'état c'est moi"—and a Front de Bœuf grilling an Isaac of York in the dungeon of his castle to gratify a sheer lust for gold. Cruelty, in other words, may be "well or ill applied." "I say," Macchiavelli adds, "well applied—if it can ever be allowable to speak well of what is evil in itself. It is well applied where it is exercised only when it is absolutely necessary for self-preservation and converted as much as possible to the benefit of the subject. Cæsar Borgia was accounted cruel, but his cruelty not only thoroughly reformed and united Romagna, but settled it in peace and kept it firm in allegiance to him." When a Prince has to exercise cruelty, it should be finished at one blow. He should not have "the executioner always at his elbow." He should do it in such a way, too, as to cut off all possibility of revenge. "Thus if he is a usurper he must take care to extinguish the whole family of the last reigning Prince," on the same principle that a new Sultan strangles all his brethren; his motto, like Strafford's, must be "Thorough." But he should never put a man to death except when there is manifest reason for it.

Ruthless counsels these, it may be said, but the State has to be ruthless. What of the general who decimates a regiment? Or of our own criminal law? We all know the old story of the prisoner who complained to the judge that it was very hard he should be hanged for stealing a horse. "You are not hanged for stealing a horse," replied the judge; "you are hanged that horses may not be stolen." In other words, You are made an example of for the benefit of society. "We judges," said Bankes J. only the other day, "know that the prisoners who come before us are the victims of circumstances, but we cannot admit the plea." And torture, has it been unknown in our favoured land of freedom? Has not the King's Council again and again made orders for inquisition by torture? Froude, commenting on the racking in 1565 of those Jesuit emissaries who were seeking canonisation for assassinating that "impious Jezebel"—Queen Elizabeth—says: "The same causes which relieve a commander in actual service from the restraints of the common law apply to the conduct of statesmen who are dealing with organised treason. The law is made for the nation, not the nation for the law." That is exactly Macchiavelli's meaning. After that pronouncement, can we pose as censors of *The Prince*?

The power of dissimulation is another useful attribute of a Prince—necessary to conciliate, necessary also to put enemies off their guard: "Qui nescit dissimulare nescit regnare." Macchiavelli does not say, like Lady Macbeth, "Look like the innocent flower but be the serpent under it"; he only says, "A Prince should take the greatest care to look and speak as if he were all

mercy, all loyalty, all humanity, all justice, all religion, especially the last. . . . He should leave odious functions (*cose di carico*) to others and reserve acts of grace (*quelle di gracie*) to himself." Well! well! is not the Sovereign among ourselves always gracious? The Sword of Justice is committed to the magistrate; the prerogative of mercy reserved to the Crown. But Cæsar Borgia's interpretation of this maxim seems to carry it a little too far.

A Vicarious Sacrifice.—This is how Macchiavelli gives it us:

> After the Duke had got possession of Romagna and found it had been governed in such a manner by those petty lords who had rather pillage their subjects than contribute to their felicity as had given them sufficient occasion to rebel, instead of living quietly and contentedly under that administration, and that there was nothing to be seen throughout the whole province but daily tumults, factions, robberies, and all other kinds of outrages and enormities, he thought it absolutely necessary to establish good order and a regular government amongst them that so he might induce them to live peaceably and in due obedience to him as their sovereign. For this purpose he made choice of Remiro de Orco, a man of an active but cruel disposition, to govern that province; and as he was invested with absolute power, he soon restored peace and good order with no small reputation to himself. After which the Duke, apprehending that the continuance of so unlimited an authority in the hands of his deputy might make himself odious to his new subjects, erected a Court of civil judicature in the midst of the province, with a worthy and uncorrupt magistrate to preside over it, where every city had its respective advocate. And as he was aware that the past severities had already excited some murmurings and discontent he resolved to clear himself of all imputations of that kind and conciliate the affections of the people entirely to himself by showing them that, if any extraordinary degree of severity had been exercised, it was not owing to him but to the rigorous and cruel despotism of his minister. Making a handle therefore of these discontents, he caused Remiro to be cut in two one morning in the market-place of Cesena and the two parts of his body to be hung up with a piece of the block and a bloody axe by the side of them, the dreadfulness of which spectacle at once appeased and admonished the people.

This fine stroke of statecraft savours—to say the least—of ingratitude. But then Macchiavelli never claims Cæsar Borgia as a virtuous man. "A man," he says, "cannot properly be called virtuous who massacres his fellow citizens, betrays his friends, and pays no regard either to his word and honour or to religion and humanity." What Macchiavelli admired in Borgia was the great soldier, the astute politician, the combination of vigour and audacity with diplomatic prudence, his adroit use of cruelty and fraud, his self-reliance, avoidance of half measures, his wisdom in employing native troops, and his firm administration of conquered provinces.

The Promises of Princes.—On the perfidy of a Prince Macchiavelli is equally frank. It is honourable and praiseworthy, he admits, for a Prince to act with integrity and good faith rather than to have recourse to artifice and collusion. Every one must be sensible of that. But experience shows that those Princes of our own times who have made the least account of their word and honour have done the greatest things, and by dint of craft

and circumvention have for the most part got the better of those who have proceeded with sincerity and regard to their engagements. Honesty is *not* the best policy for Princes. "A wise Prince therefore ought not to regard his word when the keeping it will be to his prejudice and the causes no longer subsist which obliged him to give it," and "he will never want colourable pretences to varnish the breach of his faith." "This is a maxim," he adds, "that should not be inculcated if the generality of mankind were good; but as they are far otherwise and will not perform their engagements to him he is not obliged to keep any measures with them: for if he does he will lose his dominions." He must make the lion and the fox his patterns. The lion has not cunning enough of himself to keep out of snares and toils, nor the fox alone sufficient strength to cope with a wolf: so that he must be a fox to enable him to find out the snares and a lion in order to terrify the wolves. How many treaties, how many solemn promises—he exclaims—have we not seen perfidiously violated by Princes! and those who have acted the fox have always succeeded best in their affairs. Pope Alexander VI. and Cæsar Borgia laid it down as a fundamental axiom "to give their word to anybody but to keep it with nobody," and when any one taxed them with breach of faith they answered jestingly that "they had sworn indeed to do such a thing but had never promised to keep their oath." The Emperor Charles V. used to swear "upon the oath of a good man," but made no scruple of acting contrary to his oath; Louis XI. of France had as little conscience; and so well known was the bad faith of King Ferdinand of Arragon that some one said of him that he—the King—"should swear by some God in whom he believed before he would trust him." No one, indeed, knew better than Macchiavelli the truth of the saying, "Put not your trust in Princes"—he had seen as envoy too much of Courts and witnessed the spinning of too many webs of intrigue. But if the head of the Church, if great Princes like Charles V., Louis XI., and Ferdinand of Arragon scrupled not at bad faith for their own aggrandisement, could duplicity be denied as a weapon of self-defence to the petty despot of an Italian city, precariously placed on his pinnacle of State, encompassed with perils to himself and to the State—perils from open rebellion, perils from secret conspiracy, perils still more insidious in an age when poisoning was become a fine art and death might lurk in a glass of wine, a ring, or a flower. The same problem of the legitimacy of perfidy has often presented itself to our own countrymen in dealing with Orientals. Do we very much blame a Clive or a Hastings if, when faced with the fraud and treachery of a Surajah Dowlah or a Nuncomar, they take a hint from Macchiavelli and meet fraud with fraud?

Suprema Lex.—Once grant, as Macchiavelli assumes, that a Prince's chief care is to preserve the State and himself—as representing the cause of law and order—and promises may have to be repudiated if they are inconsistent with the "salus reipublicæ." Even strict moralists like Paley tell us that an oath such as that improvident one of King Herod's anent the head of John

ıe Baptist is not binding because it conflicts with a duty of higher obligation -the commandment, "Thou shalt not kill." King Charles I.'s so-called perfidy" was of this kind—pursuing the same distinction as Macchiavelli's etween "high politics" and morality, between the Prince as a Prince and s a man. In private life Charles I. was undoubtedly a highly moral and ligious man. His so-called perfidy was a political perfidy committed in the sertion of a royal prerogative vested in him, as he conscientiously believed, trust for the nation—a trust which he could not, if he would, forgo.

An able minister of Henri IV. of France, M. de Vallerot, used to say that they had more regard for their State than their consciences." That xactly represents Macchiavelli's attitude in *The Prince*. The book, as Iegel in his *Philosophy of History* remarks, "has often been cast aside with orror as containing maxims of the most revolting tyranny: yet it was Iacchiavelli's high sense of the necessity of constituting a State which ıused him to lay down principles on which alone States could be formed nder the circumstances." Macchiavelli was not obtuse to moral conderations, but he saw plainly and did not hesitate to say that in the special rcumstances of the Italian cities of his day considerations of morality ust give way to considerations of political expediency. That may be heresy -day, but it was an accepted doctrine of the Middle Ages, and if we search ıe annals of diplomacy can we deny that kings and diplomatists, in I. de Vallerot's words, have "had more regard for their State than their onsciences," even down to a period within living memory? Not without ason has diplomacy been cynically defined as "the art of carrying into the usiness of nations a morality condemned in the intercourse of men with ıch other."

The Princely Ideal.—But it is unfair to dwell only on the darker side Macchiavelli's Prince. Craft, cruelty, and dissimulation are after all but cidents of his rule. A noble ambition, a splendid career, was open to m "to fortify and adorn his realm with good laws, good arms, good ends, and good examples." The reign of Lorenzo the Magnificent showed hat such a Prince might accomplish. The wisdom and moderation of s rule had endeared him to his subjects. Commerce under his fostering re had poured its wealth into the State. His munificent patronage of ts and learning had made Florence—its palaces, gardens, picture galleries, ıd libraries—the glory and envy of the world. All this the Prince might ıulate, but he must stand like ancient Rome, *virtute virisque*, and without ese the splendour of a Lorenzo was but the image of brass with the feet clay. The Prince must be strong in arms, able to repel attack, and ot only strong in arms, but in *native* arms. The political sagacity of acchiavelli is nowhere more strongly manifested than in the stress he always laying on a national militia and in his exposure of the rottenness the condottieri system adopted by the Italian States. "The ruin of aly," he says, "is due to nothing else except this, that we have now for

many years depended upon mercenary arms." The result was what might be expected. Either the captain of condottieri was a man of ability or he was not. If he was not you were defeated in the field: if he was you were at the mercy of his ambition.

It is not until the closing chapter of *The Prince* that Macchiavelli discovers his real ideal. That chapter is a passionate appeal to his patron —the then Lorenzo de' Medici—to deliver Italy out of the hands of the barbarians—Italy which was lying prostrate at the feet of the foreign conquerors, "without any head, without laws or civil order, plundered, trampled upon, pulled to pieces, overrun and overwhelmed with every sort of calamity." The dream which he dreamed—and which was destined three centuries and a half later to come true—was that of a united Italy strong in the possession of a national army against all foreign invaders. Let such an Italy inspired with ancient valour take the field and the contest would be short.

Virtu contr' al furore
Prendera l' arme e fia il combatter corto
Che l' antico valore
Ne gl' Icalici caor' non e ancor morto.

Idealist, patriot, political philosopher, historian, playwright, man of affairs, all these Macchiavelli was, and all in an eminent degree—a many-sided genius. But popular ignorance and vulgar tradition, the pious horror of the anti-Macchiavel, the undiscriminating brush of the historical scene-painter, and the bitter ban of the Church have combined to daub him black, and black he will remain to the end of time, a moral Guy Fawkes.

GERMAN COURTS AT WORK.

[*Contributed by* JULIUS HIRSCHFELD, ESQ.]

THE movement started in Germany about six years ago and aiming at nothing less than a fundamental change of her judicial system set loose a flood of literature discussing our Courts and procedure and the feasibility or desirability of, at least partly, taking over elements of our institutions for their uses. The flood has subsided, and very nearly run dry. But the last and largest deposit it has left behind is Prof. Gerland's book, which, in over 1,000 pages, purports to give his countrymen on this enormous canvas an extraordinarily detailed picture of the organisation of our Courts. The work has been reviewed in this Journal and elsewhere, and I do not wish to add anything in respect of its intrinsic value. The German reviews I have read do not seem altogether enthusiastic, some even not unqualifiedly favourable; and none of them contains any positive suggestions implying the fruits of the study of the book. As regards the ordinary run of German lawyers, however interested they might be, I should think that their feeling after reading in the book may be somewhat like that of the student in *Faust*:

> Mir wird von alledem so dumm,
> Als ging' mir ein Mühlrad im Kopf herum.

The same state, I believe, would be produced in an English reader were he confronted with an English version, elaborated on the same scale, of German legal institutions, though the latter are simplicity itself as compared with ours.

The modest task on which I have ventured is limited strictly to a presentment of the mere outlines and salient points of the German administration of justice; and in order to convey the better to the English mind a practical notion, especially as regards figures, I will refer, as typical, to Prussia only, which is near enough in population to our own to facilitate comparisons.

At the head of the administration stands the Minister of Justice. He is appointed by the King. His salary is £2,500 with an official residence. There are fourteen Courts of Appeal, one in each province. The Chief Presidents of these receive a salary of £750 each. The total number of judges of appeal is 513, and their aggregate salaries amount to £150,000

(average £300). Attached to the Courts of Appeal are fourteen principal and seventeen assistant public prosecutors.

Next come ninety-six District Courts of first instance with unlimited jurisdiction. Their *personnel* consists of the same number of presidents with aggregate salaries of £50,000 (£520 each), 373 directors presiding over divisions consisting of three members, and 1,304 judges, the two latter categories receiving salaries amounting to about one million and a half sterling. Attached to them are 519 public prosecutors.

Below these are the local Courts with limited jurisdiction (up to £15). The number of judges sitting and acting singly is 3,432. Their salaries are about the same as those of the district judges. Attached to them are ninety public prosecutors.

The business done in the various Courts, in its outstanding points, is as follows:

Proceeding in the order of the official statistics (1909), I begin with the local Courts (*Amtsgerichte*). The number of civil causes entered was 3,720,000 (leaving out the hundred), the number of hearings 2,025,000, the number of defended actions 877,000.

The seeming disproportion of the two latter items is accounted for by the fact that in the majority of defended cases more than one hearing takes place before they are finally decided. This will be explained below.

The number of (pending) criminal cases (minor offences) was 830,000.

In the District Courts, acting as Courts of Appeal from local Courts, the appeals entered were 51,000; interlocutory appeals, 37,000; hearings, 85,000.

The civil causes of first instance, including commercial cases, entered were 354,966. The hearings numbered 427,000. The divorce cases pending were 23,000. In criminal matters the informations laid numbered 700,000. They include 61,000 libel cases, which are always treated as criminal matters and are punishable by fine or imprisonment—damages, when awarded, must not exceed £300. The trials by jury (grave crimes) were 3,091; the trials by Divisional Courts (grave misdemeanours), 60,000; appeals from the inferior Courts, 73,000.

In the Courts of Appeal, appeals in civil causes entered were 34,500; in criminal matters (revisions, not appeals), 5,500; interlocutory appeals, 6,300.

Prisons.—As regards the prisons, we gather the following figures and data from the statistics. At the beginning of the year (1909) there were detained 20,473 males, 2,225 females; new arrivals: 65,827 males, 14,764 females; discharged in the course of the year: 67,017 males, 15,030 females. The daily average of prisoners was 21,900. The cost of maintenance per head was 40·1 pfennig (about 5*d.*); receipts for work done by them were about £20,000; expenditure on their work was about £18,000. On the net profit each working prisoner was credited with £6 (exclusive of his con-

tributions for insurance and old age pension); such of them as were working for outside employers, £7 10s.

In addition to the ordinary Courts there are Trade Courts and Mercantile Courts, the former numbering 240, the latter 170. They determine disputes between employers and employed. Where Trade Courts have jurisdiction, the jurisdiction of ordinary Courts is ousted. They consist of a chairman, who is neither an employer nor an employed, and a number of assessors, half of whom must be employers, half employed. The Mercantile Courts are presided over by a judicially qualified lawyer. The work done in the Trade Courts included 57,000 complaints by employed against employers, 2,474 by employers against employed. In the Mercantile Courts the complaints against employers was 14,000, of employers against employed 868.

Procedure in the Ordinary Courts.—Judges of local Courts always sit singly in civil matters. In criminal matters concerning minor misdemeanours (*Uebertretungen*) they sit with two lay assessors (*Schoeffen*), the latter having equal votes with the judge.

District Courts of first instance in criminal cases (*Vergehen*) sit in divisions of five members; as Courts of Appeal (in minor cases) in divisions of three members. In felony cases (*Verbrechen*) the bench consists of three judges sitting with a jury of twelve men (one emergency juror attending). There are special Courts for commercial causes in which one judge and two commercial assessors sit, the three having equal votes.

The Courts of Appeal are divided into senates, five judges constituting a quorum.

A few prominent features of the course of procedure in civil cases may be of interest. The pleadings must contain the essential facts on which action and defence are based, and also state the means by which the parties propose to prove their allegations. The advocates as a rule add their arguments. When the pleadings are complete, and some time before the date of the hearing, the papers are submitted to the judges. Each case is assigned to one or more of the members of the Court (referent and co-referent respectively), who, along with the President, record their opinions, which of course do not purport to be final, on its merits. The majority of the Court therefore know the facts of the case as well as its legal aspect before it comes on. It is, however, re-stated and re-argued at the hearing for the information of all the judges. A consultation of the Court follows. If the issue turns solely on a question or questions of law the decision may be given there and then. The "reasons" are, in the shape of a formal judgment-copy, always later on communicated to the parties. If, on the other hand, the determination of the case depends likewise (or solely) upon facts, then at the conclusion of the hearing the Court as a result of a consultation formulates the *thema probandi* and orders the evidence which it considers essential to be taken

by a judge or judges, commissioned or requisitioned, or at a further hearing before itself. After such evidence is taken the judges again record their opinions. Counsel are always heard.

Parties cannot be witnesses in the ordinary sense; and only under certain conditions, at the instance of the opposite party or by a decision of the Court itself, are they admitted to the making of an oath as formulated by the Court.

In the local Courts a party may appear in person. In the higher Courts he must be represented by an advocate. A party unrepresented in the former can, on application, be assisted by a clerk of the Court in drawing up his pleadings. A party who is not in a position to pay costs "without curtailing the means of maintenance necessary for himself or his family" can claim to sue or defend *in formâ pauperis*. In such a case the other party, if ordered to pay costs, has to pay not only the Court fees, but also the fees of the officially appointed lawyer of the "poor" adversary.

The plaintiff is not permitted, without the assent of the defendant, to alter the *cause* of action. On the other hand the *means* of "attack" as well as those of "defence" can, subject to costs, be modified up to the hearing which results in judgment. From the above it follows that the number of hearings may in theory be indefinite; and this is recognised as a weak point in the law of procedure, even though the Court has power to reject fresh points if it holds them to be advanced only in order to delay progress.

Advocacy.—Advocacy is practised by men who have qualified for the office of judge. An advocate is not admitted to practise before German Courts in general, but only before a certain Court. However, if registered at a local Court he may on application also be admitted at the corresponding District (and Commercial) Court should this be held as being in the interest of the administration of justice. The latter limitation likewise applies in the case of an advocate who is admitted at a District Court and desires to practise also before the corresponding Court of Appeal. As a rule, however, advocates who wish to practise before Courts of the latter class have to apply for admission there and do not then practise before other Courts. At the hearing of a case any German advocate, if instructed by an advocate who is admitted at the Court before which it takes place, may appear. Should a party be unable to find a suitable advocate, the President of the Court is bound to assign one to him, unless the case appears wanton or hopeless.

One of the duties of an advocate is to instruct without remuneration and to give opportunities for practical work to any candidates for judicial office who read with him. The supervision of the conduct of advocates is in the hands of the Committee of Advocates practising within the province of a Court of Appeal.

Costs.—The costs of litigation are regulated by tariffs and based on the value of the subject-matter. They depend also upon the stages through which the proceedings have passed.

The Education of Lawyers.—A first *sine quâ non* of candidature for the aw is a young man's qualification for entrance into a University, which can nly be acquired by the passing of a final examination at a public (Govern- ient or municipal) school. The standard is, as far as schools go, rather igh and, generally speaking, presupposes a period of about ten years, from ie eighth to the eighteenth or nineteenth year, of application to strenuous ork. In the universities, the study in which is obligatory, the curriculum ould mainly be in the direction of the law, historical and dogmatic, though very facility is given for attending to other subjects. The minimum of time be spent in the Faculty of Law is three years. After this a candidate an apply for admission to his first legal examination. When admitted he is iven a theme for a judicial essay which he has to deliver within six weeks. fter this a two days' examination in writing under supervision takes place : n the first day an essay on civil law, for which five hours are allowed, on ie second day two essays, one on criminal, one on some other branch of aw, the two together in six hours, have to be written. Statute books ay be used, but no other literature. If the candidate passes in these xaminations he is summoned to an oral examination in the various ranches of private and public law. This examination has, incidentally, lso an educative character in so far as law students are admitted as udience.

A candidate having passed these examinations has to tender some proof s to his means of subsistence for a period of five years. After this he is worn and his preparatory service commences. His official title is "referndarius." He is officially employed at various Courts under judges, public rosecutors, and advocates, to whom he is from time to time assigned. The inimum period for this stage is four years. He thus obtains practical nstruction in every branch of the law. He attends the sittings of the Courts, cts there as clerk, writes opinions on cases, draws up judgments, writes ndictments, pleads in Court on behalf of public prosecutors, and defends on ehalf of advocates or as official counsel for poor prisoners, drafts deeds for otaries (conveyancers), and takes sworn evidence for the Courts in pending uits. Besides that, he is also made conversant with the secretarial and dministrative business of the Courts. On all his work as well as on his onduct his superiors lodge reports with the President of the Court. And he imself has to keep a business calendar in which he enters the principal items f work done by him. The calendar is checked by the functionary under hom for the time being he is employed.

Having acquitted himself satisfactorily in this stage, he will be admitted the final examination. He is first given a theme for a juridical essay, to e delivered within six weeks. After that he receives a set of papers relating an actual suit, in respect of which he has to write a statement of the case, reasoned opinion, and the draft of a judgment. This part over, he submits mself to an oral examination involving practical and theoretical tests. The

"referendarius" having passed satisfactorily is then styled "assessor" and is qualified for a judgeship or for registration as an advocate. As long as he does not decide to become an advocate he remains a State official and is attached to and employed by the Court either as an auxiliary without remuneration, or, if acting as a *locum tenens* for a judge, with a small fee. As matters stand at present he might, generally speaking, expect to obtain a judgeship within from two to ten years, the period greatly depending upon whether he is content to go into a very small town or aspires to places much sought after. When appointed he becomes a member either of a Local Court or a District Court, according to his inclination and the views and dispositions of the authorities. His salary begins with about £150 and ends with about £350 to £400, even if he is promoted to a Court of Appeal. A higher figure is reached if he is appointed to a Presidentship or a judgeship in the Supreme Court at Leipzig. It is obvious that only a very small percentage attain to such positions. All the judges are entitled to pensions. A judge cannot be deprived of his office or translated against his will except on the strength of a trial and judgment passed by a High Disciplinary Court.

The above is indeed a very summary presentment of the Prussian system, yet I believe sufficient to show the vast and manifestly unbridgeable gulf between it and the English system. A juxtaposition of a few prominent figures might bring this into still more distinct relief. Taking first the judicial *personnel* here and there we have (apart from the House of Lords and the Privy Council, corresponding to the Imperial Court at Leipzig) as professional judges, in the narrower sense, in England 33 High Court judges, 5 City, 65 County Court judges. If we add to these stipendiary magistrates, chairmen of sessions, other functionaries doing judicial work such as masters, referees, recorders, registrars, we have a total staff of 300 to 400 officials. In Prussia they have for corresponding work 488 judges of appeal, 1,773 judges of first instance with unlimited, 3,425 judges of first instance with limited jurisdiction; altogether 5,686 men acting independently in a judicial capacity.

As to the number of Courts in civil matters, we have here 2 Courts of Appeal, 27 High Courts with unlimited, 70 Courts with limited jurisdiction. In Prussia there are 17 Courts of Appeal, 96 Courts with unlimited jurisdiction, 1,110 Courts with limited jurisdiction. In a similar, though on the face of it not quite so extraordinary, ratio stands the volume of work done in civil as well as in criminal cases. Two figures will illustrate it. There were civil causes entered in Prussia about 4,300,000 in a year, against 1,500,000 in England.

I have so far not brought in the Imperial Court of Leipzig because it is Prussian only *pro ratâ*. Still its composition and one special feature in its working might be of interest. The number of judges, including the Presidents, is 100. It is divided into senates; and seven members constitute a quorum. A rule quite peculiar to this Court is that a senate is bound by a previous decision of another senate subject to this proviso, that if it wishes to depart from a

principle laid down by another senate the question has to be submitted to the determination of all the other senates, civil or criminal respectively. This provision is a novelty in German practice. On principle and in theory there exists no authority for a German judge except the law as laid down by the Legislature (apart from the old Civil Law), and he is fully justified in interpreting and applying it independently according to his own lights—judicial or judge-made law having no place in German theory; though as a matter of prudence and convenience inferior Courts will generally conform to propositions as enunciated by the higher Courts. As a striking illustration I may mention that in a recent case of fraud a Court of first instance traversed a principle long maintained by the Imperial Court; and, what is even of greater significance, on appeal the judgment of the Lower Court was unanimously upheld by the combined senates of the Imperial Court.

The above proviso relating to the Imperial Court might perhaps suggest something profitable in respect of the practice of our own Courts. The practice by which a Court of first instance is bound by a previous decision of a co-ordinate Court is I believe of recent growth, and therefore may not be definitely held to be quite immutable. The modern idea that a judge should decide a case even contrary to his own view only because a brother judge vested with no higher authority, and perhaps his junior, may a day before have decided otherwise, seems neither rational nor fair, considering that it may impose upon an aggrieved party the heavy sacrifice of invoking the Court of Appeal. Would it not be practicable, no ancient and venerable dogma being violated thereby, to introduce some sort of machinery whereby a judge in such circumstances could depart from such a precedent?

Returning to Germany, the real basis of her vast organisation is of course education, which is the subject of constant care and work and deliberation not only by the authorities but by the whole profession, as can be seen by a simple glance at any of the numerous and largely read legal publications there. The production of lawyers here and there affords no analogy. While we are content with demanding from candidates a certain quantity of more or less digested knowledge of the dry bones of the law picked up maybe in a haphazard way, they train their men practically and systematically from the first as component factors in the administration of justice before they consider them ripe for an independent place in the legal organism. Nothing is left to chance. This of course is in unison with the general educational system. There must be public school education, university education, professional education as conditions of a professional position. If genius will out it is not thwarted—later on, but first comes the obligatory grounding. And the popular recognition of the advantages afforded by such strict and systematic education shows itself in this, that not only where complete school courses are indispensable are they gone through, but also where they are quite optional, as for the army, commerce, etc., are they

as a rule chosen. Such a volume of higher educational work is in the nature of things only possible where it can be supplied cheap. And cheap it is in an astounding degree, when compared with things here, owing to an immense number of higher schools being provided by the Government and the municipalities.

The financial side of "Law and Justice" in Prussia is represented by these figures (1909): Expenditure, £7,600,000; receipts, £5,200,000. Here "Law and Justice," in the Budget of 1909, figures at £4,185,336 (cf. Whitaker).

One more observation in conclusion. It has been said, and I believe is a common assumption here, that there reigns a particularly bureaucratic spirit in the administration of justice in Germany. I do not think such is the case in any higher degree than elsewhere. The substantive law, the law of procedure, and the methods of applying the law in general are as free from formality as is compatible with definiteness. The machinery in urgent cases is wonderfully quick, and throughout the advantages and convenience of the public made a very prominent consideration. The judges are quite as easily accessible as anywhere else, and of the "insolence of office" there is, in the law at least, very little to be noticed.

I would of course not dream of suggesting that we should go to Germany to learn organisation or to copy their system of education; simply because we cannot do it without destroying our own tradition and erecting an entirely new fabric for which the very foundations would first have to be laid—as little as Germany could artificially create "authority" on our pattern and "lordly" judgeships, two phenomena which have so strongly impressed our legal visitors from there.

The two systems are too diverse. But I submit that lessons for workmanlike improvements in details might be learned from one another. And that is, I think, about the only practical *raison d'être* for (long and short) accounts of and arguments on such entirely foreign institutions.

Which is the better system? Can it be said that it is better to order things so that you can get justice round the corner, or that you should think twice before entering into litigation; can it be said that the supply of justice creates the demand, or *vice versâ*; can it be said that the public in Germany is by nature more inclined to be litigious than it is here; can it be said that litigation there is made too easy, and unduly discouraged here? Who knows?

CRIMINAL PROCEDURE IN FRANCE AND ENGLAND.[1]

[*Contributed by* M. LÉON DE MONTLUC.]

IN order to help our colleagues who are not Frenchmen to understand that which follows, let us summarise in its main outlines the French system of prosecution in criminal matters.

Leaving aside special cases, or particular subject-matters, such as customs, excise matters, and forest laws, there are four different ways of instituting criminal process in France :

1. Direct prosecution.
2. Prosecutions between party and party.
3. Official accusations.
4. Prosecutions *in flagrante delicto.*

1. Direct prosecution can take place with or without the complaint of the injured party, or of the victim or of his representative. In such a case it is the Parquet which prosecutes, that is to say the prosecutor. It puts in force, in a word, that which is called in France *l'action publique*, which is in no sense the public action understood in the sense of the ancient public action of the Roman law and our ancient French law.

There are certain matters in which the Parquet, or public officer, cannot prosecute unless there be a complaint (as in the case of adultery, libels by the Press, and the abduction of minors).

When there is a complaint the Parquet can continue the prosecution even when the complaint has been withdrawn. It should be noted that when there is an informant, the Parquet must remit the information for inquiry by the juge d'instruction, unless it relates to crimes or offences with which the officers of the judicial police are themselves permitted to deal (Art. 54 of the Code d'Instruction Criminelle). (See also the Ministerial Circular of September 23, 1812.) One must not confuse the case of complaint with that of information.[2] This is for our colleagues who are not French. Let us add that the word "dénonciateur" has in no sense the interpretation of the same term "dénonciateur" in the procedure of the Isle of Jersey.

[1] The following paper was read at the London meeting of the International Law Association in August 1910. Some passages have been omitted.

[2] The informer need not be the party injured; he acts, or is supposed to act, in the general interest.

We must here remark that the complainant is not a civil claimant, and that conversely it may be that a civil claimant has not laid the complaint. We will return to this subject later.

2. The procedure is called *inter partes* when one private individual prosecutes another private individual, either before a minor police magistrate or before a police tribunal. In the latter case Art. 145, Code d'Instruction Criminelle (a Code which we shall indicate hereafter by the letters I. Cr.), indicates that the summons is issued at the request of the "person complaining." It should be served by the bailiff, or, if the parties appear voluntarily, issued by simple notice (Art. 147, I. Cr.). This excellent provision is borrowed from the Code of 3 Brumaire an IV. When it is a question of police tribunals, and not of the justices of the peace, Art. 182 of the Code of 1808 provides that proceedings shall be commenced by citation served directly upon the accused (*prévenu*). This is also borrowed from the Code of Brumaire an IV. Art. 180; only this Code styles the party prosecuting as the party complaining, while the present Code, that of 1808, took pains to denominate him more correctly as the cival claimant.

In short, the procedure is between parties when the plaintiff is the civil claimant. When there is only a complainant, not *partie civile*, it is a proceeding by way of direct prosecution by a public officer. But the public officer can also appear as joint party—that is to say, declare that he prosecutes or appears[1] as a party in the matter at the same time as the party prosecuting. There are certain matters in which this is the rule (as, for example, excise matters).

In the same way when the Parquet has prosecuted (of its own accord or not)—that is to say, in the case of direct prosecution—a private individual can appear as a civil claimant, whether he has or has not laid any previous complaint. He is in this case a simple informer (says Cambacérès), which explains the term used in the Code of the Year IV. These preliminary matters being premised, we can now proceed directly to answer the questions submitted to us by the Executive Committee of the International Law Association.

I. Partie Civile (Civil Claimant).

The civil claimant can be according to the circumstances the principal party or only an auxiliary party. However, this is only true in the case of the minor police or police prosecutions, and not in the more serious criminal cases where the important duty of taking action is reserved to the Parquet, and where the party interested can only intervene as claiming damages (except in cases of libel by the Press).

In a word, if it is a case of misdemeanour, minor offence, or certain infractions of regulations (as offences in shooting and fishing), the party

[1] "Suit" here does not mean to say "watch the case" or "attend," but has more the meaning of "entertaining."

injured can put in motion the public authority. It is necessary and it is indispensable that the party shall have been injured (Art. 63), the public action of our ancient French law having been abolished. But it is not sufficient that the individual injured should lay a complaint; it is necessary that he should appear formally as a civil claimant, or that he himself should directly prosecute, otherwise the tribunal is not seised unless the Procureur of the Republic prosecutes on the complaint (if there is one) or *suo jure* (if there is not).

According to the Code of Brumaire an IV. the Parquet is bound to prosecute all the offences (an obligation which replaced the proceeding of public action of the ancient legislation). It is differently under the Code of 1808: the Parquet is at liberty to take up any prosecutions in which it desires to prosecute, and to disregard others. On this subject the Code of the Year IV. has been seriously criticised. Sight, however, has perhaps been lost of the fact that as it was the jury of accusation which then determined the prosecutions which should go forward, this system (which was certain to work badly because of the troublous times which accompanied it) nevertheless offered an opportunity of discrimination which was sufficient to correct abuse of prosecution. It is certain that in fact all the crimes were not prosecuted, and this was right. But to go so far as maintaining that impunity was reserved for great crimes is to go against the substantial facts of history. Were not the accomplices of Carrier effectively prosecuted at the Court of Assizes of Mayenne and Loire? If they were acquitted in law it was because they established that they had done nothing except obey a duty put upon them by a legitimate authority. They furnished the formal proof that the orders had in fact been received which brought about the condemnation of Carrier, who denied them. We could cite many other famous proceedings. Whatever be the case, the system of the Code of the Year IV. did not prevail. Every complaint, every information according to this Code gave rise to a prosecution by the Parquet, therefore this Code employed indifferently the expression "complaining party"; according to the present Code the proper term is *partie civile* (civil claimant). It was then sufficient that there should be a complaint which could be prosecuted in law. In our days, on the contrary, complaint and prosecution are two things and two distinct ideas, as also are complaint and information.

The Parquet can disregard a complaint, as it can disregard an information, an official report, or even a *procès-verbal*, as the case may be. But if the complainant prosecutes—that is to say, makes himself a civil claimaint (a party to the proceedings)—the tribunal, by this fact alone, becomes seised of a public action, even if the public officer abstains from intervening. This is clear.

Ought then the Court to call upon the representative of the public officer to open the case inasmuch as he has always the right to stand aloof? If he determines to stand aside he relies upon the tribunal. But if he argues

either for acquittal or abandonment, can the Court nevertheless convict? Most assuredly, and this is right. Only has this result the characteristic of a "skilful work" (*œuvre savante*)? No, but rather one of common sense. In reality the contrary would be absurd. It indicates a want of strict logic in the organisation of the Parquet. Formerly every judge was a public prosecutor, that is to say he could put in force public process. He is none the less so to-day, at any rate as a matter of form.

There remains, however, one obscure trace in our Codes touching the point which we are now considering, namely, how to explain that the *partie civile*, that is the civil claimant (who does not put in force public process but merely sets it in motion), can confer upon the tribunal complete seisin of the procedure, if the tribunal does not possess of its own right the capacities of the public officer. Endeavours have been made to explain in other ways this power of the judge; but any other explanation is defective. To sum up, every judge can assume at the hearing the functions of the public officer who may be absent. Finally the jurisdiction conferred, according to the express intention of Napoleon I., upon the Courts of Appeal to enforce prosecutions, and to superintend the action of the Parquet generally, demonstrates beyond all question that there still rests with the magistrates on the Bench in this respect something of these their ancient judicial powers.

Nevertheless it is evident that the Parquet has in our days a very wide control in the prosecution. It can disregard a complaint, in which case the proceeding fails (*est classée*) if the complainant does not appear as a civil claimant.

The same result applies in the case of information. But there is, however, a difference between the case of information and that of complaint. If there is an information as to a minor offence, or a mere breach of law, the Parquet need only prosecute after having submitted the matter to a preliminary investigation (Art. 54, I. Cr.). And this is a wise result, for numbers of informations either arise out of complicated litigation, often out of family disputes, or are the result of vindictive feeling, rivalry or jealousy, or have a political origin. Sometimes they arise from misunderstanding. It would be quite inadmissible that any one could bring before a public hearing some person against whom information has been laid without any kind of serious foundation. The Parquet can then dismiss (*classer*) the complaint, that is to say, enter a *nolle prosequi*. But if it wishes to pursue it, it cannot without a preliminary examination impose upon an innocent person the objectionable duty of appearing before a Court of criminal procedure, and inflict on him the expense, more or less considerable, which inevitably accompanies the defence of a person accused, even though he be innocent. One must remember in effect that in France these expenses are not repaid to the person accused. It is true that in a case of complaint there is a right upon the part of the accused to have

recourse against the complainant on this score, and if the complainant has assumed the position of civil claimant he is of necessity condemned in the costs which are due to his having so come forward. The informer, on the contrary, has not occasioned the costs: sometimes he is insolvent, sometimes unknown; frequently he has acted in good faith.[1] Consequently to claim damages from him would in the great majority of instances be both a dangerous and a ludicrous proceeding, and it would compel the person informed against to publish to his own disadvantage a disagreeable business.

Take the case of a complaint against Peter, but which contains an information implied direct or indirect against Paul, what is the duty of the Parquet? Most certainly to require a preliminary inquiry into the matter or enter a *nolle prosequi*.

There was upon these points an interesting and very wise circular of September 23, 1812, addressed by the Secretary of State Merlin to the Procureurs-General. It is, as a rule, observed—namely, that if there is an uncertainty either as to the existence or the character of an offence, if there is neither complaint nor *procès-verbal*, if there is any doubt as to the individual to be prosecuted or the witnesses to be summoned, the Secretary of State forbids the Parquets to undertake a direct prosecution.

The cases when the Parquet ought to act, and can act without a preliminary inquiry, or before a preliminary inquiry has been undertaken, are clearly indicated in the Code of Criminal Procedure. They are notably all the cases when the officers of the judicial police, or any functionary, any public officer, ought to give notice to the Prosecutor of the Republic of crime or offence committed (Art. 29, I. Cr.); in addition, the cases of flagrant crime or civil offences (Arts. 2, 41, 44, 46, I. Cr.), and those in respect of which some special enactment has created the obligation. Generally the Parquets of the principal towns act in accordance with the circular of 1812. For instance, in Paris very many proceedings are disregarded. The control of this Parquet would be a work beyond human power, if one did not take pains to place there some one of altogether exceptional powers, as in the case of the present Public Prosecutor of the Republic at Paris. It is true that this magistrate is very well supported, having an excellent staff. The task is perhaps in appearance more arduous for the chiefs of the Parquet of the great towns in the provinces, such as Lille. There too the chief of the Parquet is a magistrate of quite the first rank, and he is without doubt not so efficiently assisted, for he has not such an efficient staff. There are certain secondary Parquets, a few of them, which abstain from committing to the judge of instruction cases which are not worth the trouble. Is it to facilitate the course of justice, or because they have not absolute confidence in the experience or the readiness of the juge d'instruction? One can ask the question: we limit ourselves to saying it is not in conformity with the object of the law.

[1] As Cambacérès observed.

Doubtless it is within the power of the Parquet itself to institute in certain cases a sort of minor preliminary or non-official investigation, to put in force an inquiry by the police or the gendarmerie, but is there not reason for fearing that by this procedure the privileges which the law has wished to secure to the accused are disregarded? The civil claimant can prosecute either before a justice of the peace or before a police court. In that case it is by a citation served by the bailiff that the party who is making the claim can cite the accused complained against (Art. 145). He should serve a copy of the citation on the person charged. It may be added that in every case, if the parties appear voluntarily (Art. 147, I. Cr.), a simple notice by the police is sufficient.

In the case of misdemeanour (Art. 182) the civil claimant is bound to issue a citation to the accused: he must make election of domicile in the town in which the tribunal is sitting; the citation states the facts, and takes the place of a complaint. If the accused is acquitted the civil claimant will be condemned in costs even against the State, that is to say the Treasury (Art. 194, I. Cr). And every complainant taking the position of civil claimant can be required to make a deposit. If the civil claimant is not the prosecutor, he is bound to elect by an entry made before the registrar a domicile in the department in which the tribunal entertaining the complaint is situated, assuming of course he does not reside there.

In the case of an *Information* by a judge of instruction, the person injured must constitute himself a civil claimant (Art. 63) before the juge d'instruction. The complainants will not be considered civil claimants if they have not made a formal declaration to that effect (Art. 66, I.Cr.). This is a general rule subject to what follows. They can make this declaration either in their original complaint or by a subsequent proceeding, or even again by presenting their claim for damages.

If the accused is imprisoned and asks to be set at liberty provisionally, the civil claimant can ask for an order for bail (Art. 122), which must not exceed three times the damage claimed (Art. 119) and over which the civil claimant can exercise certain rights (Art. 122, I. Cr.).

The party injured can equally take up the position of civil claimant in the case of procedure before the assizes. In this case the process is necessarily made the subject of a preliminary inquiry (except in the special case of libel by the press). The private individual has then had the opportunity of making himself civil claimant before the juge d'instruction. He could not in this himself put in motion public proceedings. If the juge d'instruction, judging the charge to be less grave than a misdemeanour, has remitted the accused to appear before a minor police tribunal, the civil claimant has then the opportunity of opposing this order (Art. 129, I. Cr.) in the same way that he could also oppose any decision declining jurisdiction (Art. 139, I. Cr.). Conversely, if the Court seised of a criminal appeal should remit upon the ground that the matter is one to be dealt with at the Court of Assizes, the

civil claimant can object to the decision, but only by proceedings in Cassation. He has the same remedy against every decision of the Court of Appeal which has prejudiced his interest (Art. 216). The time within which this appeal should be brought is three days. The civil claimant is never summoned to a sitting of the chamber of arraignments, which is a secret proceeding and not contentious (Art. 223, I. Cr.). But he has the right to send in a memorandum (Art. 217, I. Cr.). He can also bring before the office of arraignments objection to the accused being set at liberty (Arts. 229 and 231). He cannot appeal against the decision of *nolle prosequi*, or that of remitting to the Court of Assizes (Arts. 408 and 412, I. Cr.). This course is only open to the person condemned, or, in case of acquittal or abandonment, to the public officer (Arts. 409 and 410), but he can intervene in the case of appeal formulated by the condemned person if he is interested in its rejection. When it is the public Minister who appeals in Cassation (in the case of acquittal) (Art. 418, I. Cr.) it is not necessary that he should give notice of his proceedings to the civil claimant.

At the hearing before the Court of Assizes the individual injured can become a civil claimant through the medium of a solicitor, who states certain conclusions at that part of the discussion which appears to him to be the most opportune. It is sufficient if the civil claimant formulates his demand before the judgment (Art. 359, I. Cr.).

It frequently happens that it is only at the end of the discussion that this party formulates his claim in damages. This gives his advisers the opportunity of watching the case, and permits the particular complainant to be heard as a witness; for informers cannot be called as witnesses, but complainants can.

As the civil claimant is condemned in costs when he fails (Art. 368, I. Cr.) and has to make a deposit, it is wise not to appear as a civil claimant except with full knowledge of the whole matter. For he can only be condemned in costs if he fails.

It is otherwise in a case before the police court, where the civil claimant is liable to the costs of the procedure even in the case of the condemnation of the accused. He has, it is true, recourse, very often illusory, against the latter.

In grave offences the civil claimant, who is only entitled to appear as such if he has claimed damages, has logically a recourse in appeal against the judgment of the Court of Assizes (Art. 418, I. Cr.), but he cannot appeal except as to decisions relative to his civil interests, and this in a time limited (1) to three days (Art. 373, I. Cr.) in case of condemnation, (2) to twenty-four hours in case of acquittal (Art. 409, I. Cr.). In the latter case he can only appeal to the Court of Cassation if the judgment has condemned him in damages exceeding the amount claimed from the accused who has been acquitted (Art. 412, I. Cr.).

In the Court of Assizes a person can become a civil claimant at any period

of the process, before, during the arguments, and up to their conclusion, without having lodged either a complaint or an information. Before the police court one can make himself a party orally as a civil claimant. The accused when acquitted can do the same against the person informing against him, but it is a dangerous course to pursue.

A person cannot become a civil claimant on appeal, nor as a civil claimant put forward further arguments after those of the public officer.

II. The Preliminary Inquiry by the Juge d'Instruction and the Justice of the Peace; ought it to take place in Public and in the Presence of the Accused, or not?

(*a*) **Minor Offences.**—In France the minor police jurisdiction is organised in a satisfactory manner. The justice of the peace (a single judge) exercises jurisdiction at the same time both in making inquiry and in giving judgment. The commissary of police there appears as the public officer, but in his absence the mayor or his assistant replaces him (Art. 144, I. Cr.).

In order to be valid the procedure must in every case be in public. The person summoned appears in person or by an attorney. The justice of the peace takes the examination at the hearing; the registrar reads the formal proceedings, if there are any; then the witnesses to the charge are heard; the civil claimant, if there is one, then states his arguments; after that the accused states his defence, and his witnesses are heard; then the public officer states his arguments; and the accused can reply. This system, one can see, does not differ materially from the English system in so far as concerns the form of the procedure.

In England the magistrates, justices of the peace, conduct the investigation into all matters concerning offenders against the peace, and when the crime is an offence against the peace, that is to say, a breach of the peace, and is not serious, jurisdiction to decide has been conferred upon them. That is what is called summary conviction. There is in this case the power to release even the person charged, if he is of good character, or a suspension of sentence for three years can be granted (statute of 6 Ed. VII.). The accused must be cited personally. He must be present, except in the case of default.

The inquiry takes place in open court before one or a number of magistrates called justices, according to the case. By open court is meant the court of justices which is regularly assigned for petty sessions, or an occasional court such as a police station, or other office employed for the purpose of and by the petty sessions.

The accused can present his full and whole defence, give evidence himself and call his witnesses. He can conduct his defence in person, or he can be represented by counsel or by an attorney. A policeman can appear

in the position of prosecutor if he has been the informant. The complainant cannot drop the proceedings without the authority of the tribunal.

The following is the way in which the proceedings are conducted at the hearing. One reads to the accused the substance of the charge, and asks him if he has anything to answer. If he admits the charge he is convicted; if he contests it the justice hears the prosecutor and his witnesses, then the accused, who can at the present time be sworn upon oath (statute 61 & 62 of Queen Victoria), a serious innovation. Then the prosecutor produces witnesses to reply to the defence if the accused has produced witnesses, or has himself put in issue other points besides those of his previous character or general good conduct. But he has not the right to reply, any more than the accused can reply in answer to the witnesses in reply who appear for the prosecutor. Then the magistrates, if there are many, deliberate and decide.

The difference between the two systems are the following: In England the accused is, or can be, a witness on oath. He has not the last word, not having the right to reply. The informant, who is in effect a witness, can be the prosecutor, even if he has not been the injured party. This is occasionally a constable. In France the party can only prosecute if he is the injured party.

Endeavours have been made on both sides in recent years to assimilate the two procedures. In our opinion the result has been to arrive at a sort of hybrid combination. We think the opportunity given to an accused to take the oath is not in accordance with jurisprudence. Let us add that the justice can (a recent innovation) even in acquitting condemn in damages in certain cases. That seems to us illogical. As to the power of suspension of sentence, that is the idea of the age.

The French system appears to us to be preferable in one point, that is, that the accused has the last word in all cases.

But we think that the opportunity for a witness to prosecute for an offence which he has witnessed is very important (even though this does not accord with the view of certain British professors who think otherwise). In France, too many proceedings are stopped without being followed up. In the Tribunal of the Seine the annual total is so enormous that we dare not mention it. But we may say that at Brest thirty years ago 6,000 informations remained every year without being brought to trial. There are constant interferences by persons of influence, whether political or not; the public functionaries are assailed by solicitations asking them to stop proceedings. The English system, even if it appears bizarre, even shocking, has good in it: it is more democratic. One records the case of Lord J. R., prosecuted when he was a minister, for cruelty to animals and condemned to 40*s.* or six days' imprisonment. In France this would be impossible. The commissary of police who had the audacity to entertain the proceedings would have been certain to ruin his career, and every magistrate of the Parquet

who took part in prosecuting the offence would have had a rap over the knuckles.

(*b*) **Police Proceedings.**—It is here that the French system is at the same time both inappropriate and complex.

The proceedings can be commenced as follows :

(1) Either by direct prosecution ;
(2) Or between parties ;
(3) Or by being the subject of an information ;
(4) Or as being taken in the act.

One can add (5) in special matters (taxes, customs, claims, etc.).

In the case of direct prosecution there is in effect no previous inquiry. The Parquet can of course make investigations, but they do not involve any real judicial guarantee, not being scientifically conducted. If the offence has been stated in a *procès-verbal* there is without doubt a good foundation for prosecution ; but when the facts have not been elucidated by a police report in which the parties are heard, one may say that the process comes to trial in the condition of a claim without solid foundation. Often the police are the victims of false information, misunderstanding, and regrettable blunders. Sometimes one individual is prosecuted in mistake for another, the true identity of the accused and his exact domicile being unknown. When the preliminary inquiry is instituted by the gendarmerie it is more valuable, but it is very rarely efficient even in that case, because the gendarmerie exercise great caution. If the accused has been arrested, the Parquet having been in a position to put questions to him, the result is that some light is thrown upon the case by this short examination, more or less regular. But frequently the procureur prosecutes without having put questions to the accused, without knowing him, without knowing that he is prosecuted, without knowing even that he exists. They are the off-horses who have taken part in the case, which comes to hearing without proper investigation.

The president has in this case the duty of conducting the public examination. The examination takes place in court ; it must be in public at the risk of being quashed ; and is conducted as in the case of a minor police prosecution.

The accused can be questioned by the president (Art. 191, I. Cr.), which is a necessary part of the proceedings if there has been no previous inquiry into the facts. The accused conducts his own defence, the prosecutor sums up the case and states his arguments, and the accused can reply. In short, the accused is present at this inquiry, which takes place in public.

If the case is one between parties it is just the same, only the civil claimant has in that case the right of addressing the Court either by himself or by his advocate.

But the case is different before the juge d'instruction, when the case or

the circumstances have been the subject of an "Information." The juge d'instruction sits in private and examines the witnesses in the absence of the accused (Art. 73, I. Cr.); this is a plan which is not free from danger; the deposition thus taken has scarcely any weight. There is also the loss of the public hearing. In the case of an information every one making his deposition in the absence of the accused is concerned before everything with making his evidence square with the facts to keep out of an awkward position or to divert suspicion from himself, his relations or his friends.

This does not present any very great difficulty for a magistrate of great experience, whose coolness and judgment enable him to weigh the true value of such depositions. But how much the young judges are misled by the signs, by the interested insinuations of clever peasants who mystify them, or by the suggestions of this or that eager or imaginative informer!

The English system of examination in open court is in our opinion preferable.

There is the fourth case in France, that of the procedure when the accused is caught in the act. This procedure was authorised by the Law of May 20, 1863, under Napoleon III., that generous ideologist who took plèasure in imitating England, and who in framing this law had for his principal object the imitating of Bow Street. But this innovation squared very badly with the peculiarities of our criminal, judicial, and administrative institutions and with our customs.

The prosecutor acts officially in such a case; this procedure can only take place in the case of the arrest of the accused, it is not applicable to crimes by the Press, political crimes, nor the matters by which the procedure is regulated by special law. In this procedure there is no information nor preliminary examination, scarcely any official[1] inquiry; it has the advantage of rapidity but it exposes the tribunal to the risk of mistakes. By reason of the establishment of a judicial register it is necessary to ascertain the antecedents of those charges, which is scarcely reconcilable with this summary procedure. Those who are caught in the act often conceal their identity during the first days of their imprisonment; the tribunal must then postpone the case; consequently the object of the Law of 1863 is not attained. The minister has to a great extent recognised that this system, hastily patched up, presents such enormous inconvenience in France that it has taken care to exclude it in the case of minors under the age of eighteen years, and also in cases where exile can be inflicted. I have seen most unfortunate mistakes result from this procedure.

In the intention of the legislator of 1808 every case was to be the subject of preliminary examination when there has not been any complaint. This is also the case where there has been an information according to the English system. The present system makes a fundamental change in the spirit of the legislation of the First Empire.

[1] Styled "officieuse."

Without doubt there exists in England something which at first sight appears to be analogous in this sense, that certain offences can be dealt with without any preliminary judicial investigation, but the analogy is one entirely superficial.

Summary conviction indicates as a rule either the confession or the consent of the accused unless the damage caused does not exceed 40*s.* in the case of petty larceny or picking pockets or unless it is a question of acts of violence which are not serious. (It is to be remarked that in the last case it is necessary there should be a complaint.) Otherwise the accused must be sent before a jury—that is to say, committed for trial.

It is not then in this case a question of an official prosecution; there has been of necessity an informant, as a rule by a written statement (for that is the practice, and in some cases the law demands it); the written statement is made on oath and the information is followed by delivery to the accused of a statement which tells him the substance of the charge. The magistrate can be compelled to issue a summons if he refuses. If the accused does not appear upon the summons the magistrate issues a warrant unless he is entitled to proceed in default.

The arguments take place in open court, that is to say publicly. The meaning of this expression has been already explained. It means in effect a public hearing. There the case proceeds as we have already explained in the case of minor offences or breaches of regulations. The magistrate may direct a trial with closed doors either wholly or in part, but that does not the less constitute a public hearing.

One sees that the English system differs in vital points from the French system of direct prosecution of cases of *flagrant délit* which present or offer very few guarantees.

In England the prosecutor whether voluntary or not is a witness who must depose to that which he has seen. In France, in the case of official prosecution, it is a third person who may have been informed by some other individual that a crime has been committed and who has neither seen nor knows anything definite of his own knowledge. Often this third person (the Public Prosecutor) has been deceived; in other cases the informant (complainant or witness) rounds on the Parquet and takes sides with the accused, so that at the hearing there is nothing left of the accusation. If there has been a *procès-verbal*, above all in the case of the constabulary, it is rigidly kept back at the hearing, but since the recent gendarmerie laws this body does not interfere in the cases which are most interesting in this respect, those of the small offender.

In consequence it happens that sometimes the authors of the written process (other than the police) maintain with persistency and sometimes in bad faith proceedings ill founded (we have seen it); there is in this case danger of an innocent person being condemned. It is true that the Court of Appeal will put matters right. But what of the expense, what of the trouble

in consequence of some minor offence, perhaps a mere breach of regulations and of no real importance, and above all what about the time lost? But was not the idea of this direct procedure to secure the rapid administration of justice?

We think then that the English system is, so far as minor police court cases (minor misdemeanours) are concerned, preferable to our own system, but is it adapted to the manners of our country? There is room for doubt. In every case it is irreconcilable with our judicial administration and political organisation.

(*c*) **The Case of Grave Crimes.**—In this case the examination before the Court of Assizes is in public, but it has been preceded by an information or a secret examination just as in the case of police prosecution upon information.

The accused has not appeared before the office of indictments,[1] and the hearing has been in secret.

In England everything has been in public, in open court, and opposed (save in the case of default *ex parte*) with the exception of the procedure before the grand jury, a stage in the British penal procedure which is much criticised by experts. The French system of issuing indictments is also open to criticism. It may be asked, what is the good of magistrates who do not hear the witnesses? However, experience shows that it is not useless machinery. The tribunals examine with great care the file of papers in these cases (such is the case in the Courts of justice to which I have had the honour to be attached), the work of the office of indictments is made in earnest, is very useful, and affords an important guarantee for the good administration of criminal justice.

We think if any change is to be made in France it should be to endeavour to make the information or preliminary examination analogous to that which exists in England, that is to say, to make it a public hearing, and not a hearing before a secret tribunal.

The accusation ought to be public and in the presence of both sides at all its stages.

III. Is the Accused Free during the Preliminary Inquiry and is he Allowed to Find Bail?

(*a*) In France that depends upon the nature of the case. On the assumption that the procedure is *en flagrant délit* the accused is necessarily detained. Otherwise this expeditious method could not be put in force.

(*b*) In the case of direct prosecution by a party the accused is generally at liberty; one may even say he is free on principle. If the case has been submitted to a preliminary investigation upon the complaint of the injured party, we will deal with the case later on.

[1] Hearing in chambers.

(*c*) In the case of information: in this case if it is not a case *en flagrant délit* the accused remains free and if the punishment is only a fine he must remain free. The examining judge can in effect issue a simple summons or a warrant, or a warrant of commitment or arrest. He has, if it is a case of imprisonment, the right of determining the nature of the warrant according to the nature of the case, the importance of ascertaining the truth and the greater or less danger of the disappearance of the accused.

Only if he issues a warrant of "arrest," imprisonment is compulsory so far as he is concerned; he cannot quash or modify it anyhow; but he could suspend a warrant of attendance or of custody according to the circumstances. In every case he has a power to order that the accused should be provisionally set at liberty. In minor offences this setting at liberty is as of right five days after the examination, in the case of every accused who is not previously convicted, if the maximum punishment is less than two years' imprisonment (Art. 113, I. Cr.). In other cases bail can be demanded (Art. 114, I. Cr.). In every case the juge d'instruction can review the decision which he has taken respecting provisional release (Art. 115, I. Cr.). Only the accused can apply to the chamber of indictments (Art. 115, I. Cr.).

The French system is good and satisfactory on these points. The question remains one of its application. Generally the administration is also good, deliberate, wise, at any rate in our day. However, a great deal of use is made of preventive detention in certain prosecuting offices both because of its convenience and as a means of arriving at a more certain elucidation of the charge. This last reason is in our opinion illusory in many cases, but this is no more than a personal opinion.

In England, penal procedure in criminal cases commences much more frequently by arrest. Only the provisional setting at liberation is compulsory for the magistrate in the majority of offences, that is to say, it is imperative except in certain exceptional cases, as notably embezzlement, receiving stolen goods, and assaults in connection with strikes. The magistrate in every case may or may not require bail; if he does not require bail the accused enters into recognisances. In practice temporary release is refused in case of murder and it is inapplicable in the case of the crime of high treason. The King's Bench Division exercises jurisdiction analogous to that of the French office of indictments.

Either one or the other legal system appears to us to be sufficient in this respect.

IV. When is the Investigation Finished as far as the Accused is Concerned and when does the Trial Commence?

In France, in the case of direct citation or *flagrant délit* there is only a non-official inquiry or no inquiry at all. If there has been one it comes to an end at the opening of the public hearing in Court. The tribunal, however, can direct the public official to make further inquiries.

If there is a preliminary information, it is terminated by the definite order of the juge d'instruction, that is to say, by an order sending the accused to be dealt with by the police tribunals or discharging him (judgment of *nolle prosequi*).

If it is a case of a serious criminal the office of indictments can complete the inquiry and the president of the Court of Assize can himself also complete the inquiry.

The process commences for the accused when the juge d'instruction has sent him back before the police tribunal or when the office of indictments has sent him before the Court of Assize; until then there is, in our opinion, no cause pending, but this is in every case a question of terminology and definition almost academic.

If the case is between parties, or is on a direct prosecution, the proceedings commence the day on which the case is entered and inscribed on the register.

V. Matters which must be Submitted to the Jury.

In France these are, besides certain proceedings against the Press, certain crimes (such as offences) which are described as crimes against the public interest—coining, the forging of banknotes, fraud by public writing or by public or commercial documents, bribery, corruption of public officials, assassination or murder with premeditation, wounding which would cause death if it is committed with premeditation, suicide, rape, offences against children under thirteen, illegal arrest, abduction, infanticide, robbery with violence, robbery committed on the highway at night by two or more with weapons, robbery committed at an inhabited house either by housebreaking or by forcible entry by skeleton keys. So also if a robbery has been committed by night in an inhabited house or committed at night by many persons in an inhabited house, which are termed robberies with circumstances of aggravation. Robbery with circumstances of aggravation is also established when it is committed by a servant in the house of his master, by a workman in the workshop of his employer, or by an innkeeper who steals all or part of the things which had been entrusted to him in this position. Another case is that of fraudulent bankruptcy. Also the abuse of trusts with aggravating circumstances and arson.

In point of English law all the crimes which are called indictable offences are submitted to the jury, that is to say, such as can be embodied in the indictment, or the subject of an inquiry, or brought before the grand jury. This formula includes felonies and misdemeanours, that is to say, offences which are not felonies.

Let us enumerate the principal cases: piracy, high treason, sedition, desertion, mutiny, counterfeit coining, the publication of official secrets, blasphemy, prison-breaking (according to the circumstances), perjury and

subornation of perjury, conspiracy (a term very comprehensive), bigamy, murder, homicide, rape, assaults upon women, obtaining abortion, abandonment of children, grievous bodily harm, that is to say with real wounds, robbery with circumstances of aggravation, swindling, breach of trust, burglary, fraud, arson, and defamation. In the end the two systems seem to lead to the same result so far as the assizes are concerned. Under both systems the same kind of cases are submitted to juries.

But there are points of difference: (1) In France these offences are not submitted to the jury except certain exceptional cases; in England they are submitted to the jury with certain exceptions. (2) In England the magistrate deals with certain indictable misdemeanours if the accused has consented or in certain cases if he pleads guilty. In France the jurisdiction is a matter of public rule; there is nothing optional about it.

At the establishment of the Code one could have said in general terms the infliction of every punishment of five years and upwards or of any more severe punishment is referred to the Court of Assizes (in 1810). In effect this Court inflicts death, hard labour (with a minimum of five years), solitary confinement (with a minimum of five years), banishment or transportation (with a minimum of five years).

But this answer is not sufficient to make the matter clear to a stranger, for it would be necessary previously to explain what is the meaning of *reclusion* (imprisonment). Besides, let us say that in our time such a reply would give a very inexact idea of the true condition of things.

In practice the Court (of assizes) inflicts all sorts of punishment. In consequence of aggravating circumstances (admitted or rejected), extenuating circumstances, excuses, youth of the accused, the law of respite, legislation of Press laws, and above all the existence of subsidiary questions.

In effect, by the operation of new and special laws, the organisation of the judicial register, and recidivism, police courts can in many cases inflict punishments more severe than those which are formally fixed by the Penal Code of 1810. There is also the power of transportation (styled *relégation*).

VI. Delay in the Institution of Criminal Cases.

The time allowed in France is three years for minor offences and ten years for indictable offences (Arts. 637 and 638, I. Cr.) It is one year for simple breaches of the law (Art. 640, I. Cr.).

On this point the French law is superior to the English law, which does not lay down any absolute rule. There is no prescription for indictable offences unless there happens to be a special provision with reference to certain crimes, as in the case of high treason, three years; twelve months for sedition; for night poaching and smuggling, three years; and indecent assaults, six months. Generally the prescription is two years if it is the case

of a penal statute which does not lay down a shorter time involving forfeiture of the goods to the King (31 Eliz. c 5); one year if the forfeiture is to the profit of a private individual.

We will not continue further on this head, which itself might be made the subject of a long treatise.

VII. Payment of Criminal Costs.

In France the convicted bears the costs of the proceedings in all cases. When there is a civil claimant he can be condemned in costs if he fails. Further, every police judgment of conviction condemns the civil claimant who is successful, in costs, except his redress against the person convicted.

It is otherwise in the case of the assizes. There the costs are only charged to the civil claimant when the accused is acquitted.

One must agree that all this is very illogical, but the Legislature has not wished to encourage rash prosecutions by private parties.

The English system is different from ours. The costs can include the expenses of the defence, which are not taxed in France. The English magistrate in the case of a criminal condemned on indictment can award the whole or part of the costs to the prosecutor—even in the case of acquittal or no true bill being found. It is the same with the greater part of cases of misdemeanour, except in the case of appeal by certiorari. It is the same also in the cases already referred to above under the head of Summary Jurisdiction. This system is perhaps more just than ours, but it appears to be less judicial.

VIII. Should the Scottish System of Not Proven be Introduced into the French and English Law.

In our humble opinion we should say not. In France the Judge is compelled to decide. He cannot avoid it by the *non liquet*. The denial of justice is severely punished. If he has any doubt the judge ought to acquit.

If the juge d'instruction in France is in doubt he has only to make an order of *nolle prosequi*. It is the same in the case of the office of arraignments. Besides, the order or judgment of *nolle prosequi* is not final.

It is otherwise in the case of the judgment of the Court of Assizes. Acquittal by the jury has the force of a decision. Consequently, after the pronouncement of a verdict in the negative the Court has no judgment to deliver, and it is by the simple order of the president that the accused is declared to be acquitted or discharged according to the case. In the same way a judgment of the police court has the force of a decision if it is without appeal and final.

The effect of the decision is the safeguard of the citizen. Therefore it is not necessary to make any change upon this point in France. It seems

to us the same in England. If the grand jury is in doubt it need only abstain from giving a decision and answer: No true bill.[1] As to the jury, when it is not able to agree it indicates in the same way its doubt. In the case of the justices they have always the right of declining to punish if they are not certain as to culpability; they can even remit in certain cases. This is amply enough to set their minds at ease.

We should not therefore counsel the introduction into one or the other system of not proven.

[1] It is to be noted that there is a difference between the office of arraignments and the grand jury. The indictment states the facts as established and it is necessary to answer by the bill "true." In France the office of arraignments simply declares whether there are or are not sufficient charges.

THE FRENCH GOVERNMENT AND COMPARATIVE LEGISLATION.

In this country attention has not been drawn to the important measures taken by the French Government for the encouragement and promotion of the study of comparative law and international law. It may be of interest to see the full text of the decree creating an office of foreign legislation and international law, dated July 21, 1910:

Art. 1.—The office of foreign legislation and international law has for its object:

1. To centralise and put at the disposal of the public the legislative acts and documents of foreign countries, to preserve, maintain, and increase the collection of works on international law and of comparative and foreign laws existing at the Department of Justice;

2. To continue the publication of the collection of the principal foreign codes and to undertake all translations and all work connected with comparative legislative or international law;

3. To furnish to public administrative bodies, judicial bodies, parliamentary commissions, information on treaties and foreign laws;

4. To furnish to all interested persons certified copies or translations of the texts of foreign laws, treaties and all other documents;

5. To publish memoirs or works on foreign legislation and international law;

6. To open relations with administrative bodies, associations, and scientific institutions of France and other countries.

It may, moreover, be consulted on questions of foreign legislation or international law which the Keeper of the Seals deems proper to submit to it.

Art. 2.—The collections and properties of the service of foreign laws existing at the Department of Justice are turned over to the office of foreign legislation and international law.

Art. 3.—The office is directly under the Keeper of the Seals, Minister of Justice.

It is placed under the scientific direction of a committee of foreign legislation and international law constituted in accordance with Art. 4 hereunder.

It is administered, under the authority of the Keeper of Seals, by an administrative council composed in accordance with Art. 7 hereunder.

Art. 4.—The committee of foreign legislation and international law is composed:

1. Of members appointed by the Keeper of the Seals and which shall not exceed twenty in number;

2. Of members in their own right who are:

The directors of the Ministry of Justice;

The director of administrative and technical affairs at the Ministry of Foreign Affairs.

The president and vice-president of the committee are appointed by the Keeper of Seals.

The chief of the office, whose employment is provided for by Art. 15, discharges the duties of secretary of the committee, with consultative voice.

Art. 5.—The committee proposes to the Minister the translations of foreign laws and all other work to be undertaken. It selects the translators and other workers, controls and revises their work and superintends its publication.

It is called upon to give advice on regulations concerning the office, as well as measures intended to improve its organisation and workings.

Art. 6.—The committee will meet as often as necessary and at least once each quarter.

Art. 7.—The administrative council of the office of foreign legislation and international law consists of the president and vice-president of the committee on foreign legislation and international law, of two members of the committee designated by the Minister, and of the director or chief of the office of the Keeper of Seals. This council is presided over by the president of the committee, and, in his absence, by the vice-president.

Art. 8.—The office is represented at law and in all acts of a civil nature by the president of the administrative council. This person is competent in all that concerns the property of the office, to institute or defend, without authorisation of the administrative council, all possessory actions, to apply for injunctions and to take measures necessary to preserve or enjoy the property. In case of the absence or disability the president of the administrative council is replaced by the chief of office.

Art. 9.—The administrative council is consulted each year, in the preparation of the budget by the Ministry of Justice, as to the amount of money to be included in this budget for the expenses of the office.

On the month following the vote of the budget, it makes propositions for the employment of the income from the property of the office and gives its advice on the employment of the appropriation made by the Law of Finance to the Minister of Justice for the office.

Art. 10.—The administrative council determines the management, acquisition, and disposal of the property of the office and the expenses which must be met by means of the income from that property. It gives its advice on the subject of expenses to be charged to the appropriation mentioned in paragraph 2 of Art. 9 which precedes.

The decisions taken in execution of the present article become operative only after the approval of the Keeper of Seals.

Art. 11.—The administrative council passes upon the acceptance or refusal of gifts and legacies made to the office, without obligations, conditions, or restricted to a set purpose, as real estate, and when there are no conflicting family claims.

When the gifts or legacies are burdened by charges, condition special, or restricted to a set purpose, as real estate, or when they give rise to conflicting family claims, the acceptance or refusal is authorised by decree of the Council of State.

When the gifts and legacies are made with a special restriction the decree of authorisation notes that restriction.

Art. 12.—Funds resulting from gifts made to the office are turned into the *caisse des dépôts et consignations*.

The ulterior use of these funds can be effected only by virtue of deliberations of the administrative council, approved in accordance with paragraph 2 of Art. 10 of the present decree and subject to the conditions provided by Art. 33 of the Law of Finance of December 31, 1907.

Funds received through the delivery of copies or translations or through the sale of publications, in accordance with the tariffs established jointly by the Ministers of Justice and Finance, are turned into the treasury under the head of miscellaneous proceeds of the budget.

Art. 13.—The expenses of the office comprise exclusively the salaries and allowances of the permanent personnel and of the auxiliary and temporary agents, the maintenance of the collections, the acquisition and binding of works, subscriptions to publications of foreign legislation or international law, the installation of libraries, the preparations of catalogues, of record slips, etc., the expenses of the bureau and incidental expenses of the office.

Art. 14.—A report on the administration and workings of the office is presented yearly by the president of the administrative council to that council, and transmitted to the Keeper of the Seals.

Art. 15.—The personnel of the office of foreign legislation and international law is composed:

1. Of a chief of office, keeper of the library;
2. Of an assistant chief discharging the duties of librarian;
3. Of a clerk and translator, discharging the duties of assistant librarian.

Art. 16.—The personnel of the office is appointed by the Keeper of the Seals, after examination, on the proposal of the administrative council.

To become eligible to take the examination the candidates must:

1. Be French and have complied with the military law as far as service in time of peace is concerned;
2. Be accepted by the administrative council of the office.

The number and nature of the tests, the method of constitution of the jury, the forms of the examination, the classes of diplomas or the certificate of study are specified by a departmental order on the advice of the administrative council.

Art. 17.—Special translators, attachés, or auxiliary agents, appointed by the administrative council upon the advice of the chief of office, may be temporarily employed.

Art. 18.—The salaries of the personnel of the office are fixed on the advice of the administrative council by a decree countersigned by the Minister of Finance in accordance with Art. 55 of the Law of February 25, 1901.

The allowances of special translators, attachés, or auxiliary agents are fixed by the Minister of Justice on the recommendation of the administrative council.

Promotions are made within the bounds of the appropriation by the Minister of Justice, on the recommendation of the administrative council and on the advice of the chief of service of the office in the case of one of his subordinates.

Art. 19.—Disciplinary measures concerning the employees of the office of foreign legislation and international law are taken by the Minister, the employee having been heard or duly summoned, upon the advice of the administrative council.

Art. 20.—Orders of the Keeper of the Seals will prescribe the measures necessary for the execution of the present regulations other than those above specified.

Art. 21.—The Keeper of the Seals, Minister of Justice and Minister of Finance are charged, in so far as it concerns him, with the execution of the present decree, which will be published in the *Journal Officiel* and inserted in the *Bulletin des Lois*.

The work of the above office, so far as performed in this country, is, and for many years has been, done solely and gratuitously by the Society of Comparative Legislation.

NOTES.

The Penitentiary Congress at Washington.—Educated opinion in America, Germany, and England is more and more busying itself with how to stay, by the improvement of social conditions, the manufacture of criminals rather than reform them when created: recognising the old truth that prevention is better than cure. And in this task of prevention need to be enlisted all the resources of modern statesmanship and modern science. America—always enamoured of legislative experiments—has followed out this principle by the sterilisation of criminals (Indiana), the prohibition of the marriage of epileptics, and by a careful study of "defectives." More general attention is being paid to eugenics, and nearly all civilised nations are concentrating on the child. Meantime, however, the actual criminal has to be dealt with, and on this subject the recent Report of Sir Ruggles Brise, the British representative at the Eighth International Penitentiary Congress held at Washington, with its admirable Introduction, is full of instruction. At present the treatment most in favour in the States is the "indeterminate sentence." This is strictly a misnomer—there is no "indeterminate sentence" in the sense of a sentence without a limit—a maximum or a minimum. The indeterminate sentence is used as a catch phrase to indicate opposition to the "retributory" element in the punishment of crime. It is for making, not the guilt of the criminal, but his potentiality for reformation, the test for the duration of punishment, and it entrusts the power of judging of this potentiality of reformation not to the judiciary but to boards of parole. This is more than a mere change of method: it marks a new attitude towards crime. In America public opinion is much more tolerant than in the older communities. It is less impressed with the guilt of the offender than the necessity of reclaiming him to honest citizenship. On this attitude towards crime Sir Ruggles Brise offers a very just criticism. "You cannot," he says, "expel human nature with a fork, and moral indignation against the perpetrator of an anti-social act is in human nature, and will demand certainty and fixity of punishment when there is full responsibility for the deed. It is a misnomer and a fallacy to refer to this healthy moral sentiment as a desire for vengeance or as the old classical idea of expiation. In its modern shape it merely expresses the determination of the human consciousness that the system of rights should be maintained and that the person who violates it should be punished." Nevertheless the "indeterminate sentence"—the individualisation of punishment, as it may be called—carried the day

at the Congress. But if we are to have this individualisation of punishment worked by a board of parole it is clear there must be the closest relation between the judge who passes the sentence and the prison authority which executes it.

The State and the Schoolmaster.—An interesting case (*Holder* v. *Williams*) is reported from New South Wales as to the liability of the State for the negligence of a public schoolmaster. The facts were these: The master was about to give a chemistry lesson in the class room, and told one of the pupils to fetch a tumbler standing on the table in his private room, but gave him no warning as to the contents. In fact, the tumbler contained diluted sulphuric acid. The pupil thought it was only dirty water, and threw it away as he went by the porch, just as another pupil was passing. The acid entered the passing boy's eye and inflicted serious injury, for which the pupil sued the State. The jury found that the master was guilty of negligence in keeping a dangerous chemical in a tumbler and sending a boy for it without warning him of the contents; but then the question arose whether the State was liable on the principle of "respondeat superior" for the negligence of the master. Under the New South Wales Public Instruction Act, 1880, and the Public Service Act, 1902, public school teachers are civil servants of the Crown. That was admitted; but looking at the peculiar position which a schoolmaster occupies in the eye of the law, it did not follow, so the Court held, that the Government was responsible for every negligent or wrongful act by him in the performance of his duties as schoolmaster. A duty is cast upon the Government of providing suitable school buildings and educational apparatus and of exercising due care and skill in the selection of teachers, but there is no duty cast on it of insuring parents and children against risk from the negligence of a schoolmaster. Subject to any special regulations the duties of the teacher, in the selection of his methods of tuition and discipline, are governed by the rules of the common law, under which he is acting, not as a servant of the State, but in pursuance of an authority delegated to him by the parents of the pupils. Supposing, for instance, a public schoolmaster were to punish a pupil with undue severity, could it be argued that an action for assault could be brought against the Government?

The case is analogous to that of *Hillyer* v. *Governors of St. Bartholomew's Hospital*, [1909] 2 K.B. 820, where the Court of Appeal in England held that an action would not lie by a patient against the Governors of the hospital for injury caused to him during an operation by the negligence of a member of the hospital staff. The Governors' duty is discharged if they appoint competent men and provide proper appliances.

Heathen Chiefs and Christian Marriage.—Sir Charles Tarring, ex-Chief Justice of Grenada, writes: "During a recent visit to South Africa a curious and anomalous state of things in British Bechuanaland was brought to the notice of the writer. A Christian native living on a native reserve near Vryburg complained bitterly of his plight under the following circumstances.

He had married a wife of the tribe, with full Christian rites solemnised in church. Subsequently she had left him and openly consorted with another man. The husband had brought the matter before the chief—the only course, as he said, open to him. The woman appeared, and stoutly declared that she had no intention of returning to her husband, and meant to live with the other man. But the chief was a heathen ; and being unaffected by any sense of the sanctity of Christian marriage, simply did nothing, and the injured husband could get no redress. The explanation is that by s. 16 of the Bechuanaland Annexation Act (No. 41, 1895, of Cape Colony), by which the territory was annexed to the Cape, the jurisdiction allowed to chiefs by ss. 31 and 32 of the Schedule to Proclamation No. 2 B.B., 1885, was left unaffected. The chiefs therefore continue to exercise jurisdiction over their respective tribes in civil as well as most criminal cases, an appeal only being given to the resident magistrate by s. 33. The object no doubt was a laudable one—to interfere as little as possible with the internal life of the people. What has actually happened can hardly have been in contemplation. Sections of the tribes have become Christian, while the chiefs in many cases have remained heathen. The result often is that Christian tribesmen have only a heathen chief before whom to carry their disputes for settlement, of however delicate or important a character they may be. The jurisdiction of the resident magistrates being confined to hearing appeals from the chiefs, they decline to intervene in the first instance. That means that there must be a decision in some form of which they can take cognisance ; and it may well be that a chief, if he does not actually frown on appeals, is too ignorant to satisfy this condition. A good deal of feeling is being exhibited, and even resentment shown, at what is increasingly regarded as an unjust and unnatural condition for Christian natives to live under. But inasmuch as the Colonial Government gave an undertaking at the time to the Imperial Government not to amend the above provisions of the Annexation Act without 'ascertaining the views of His Majesty's Ministers,' the matter has to be considered both in London and in Cape Town in order that a solution may be found."

The Centenary of the Austrian Civil Code.—We have received an interesting account of the movement of codification in Austria culminating in the Civil Code, the centenary of which falls within this year. Dr. Tilsch (whose account of the Austrian Divorce Law appears in this number of the Journal) begins his history with the formation of the Codex Theresianus in 1766, and continues the narrative down to the present time, indicating in a very clear and striking manner the chief features of Austrian legislation. The Code of 1811 was the work of men who had grown up with the ideas of the eighteenth century, believers in an unchangeable law of nature, with a predilection for liberty and equality. In the stronghold of resistance to the Revolution some of its principles had got a firm footing ; Martini and Zeiller sought to infuse into the old elements the newest products of their time.

Dr. Tilsch divides the century into three periods of legislation: conservative absolutism from 1811 to 1859; constitutional liberalism from 1859 to 1879; and the period of social welfare, 1879 to 1911. Austria has not been wholly outside the movement which has elsewhere of late swelled the volume of legislation. But it would seem that the Civil Code celebrates its birthday almost unchanged. Into a small space is crowded a surprising amount of information respecting legislation which is in many respects a replica of that of other European countries supposed to be more subject than Austria to popular influences.

The George Junior Republic.—America is trying under this title a bold and novel experiment in the development of character by self-government by boys and girls between the ages of fourteen and eighteen. "Nine States," says Sir Ruggles Brise, "have already adopted the plan. The Republic is a miniature State, comprising 350 acres, of which the 'citizens' are 150 boys and girls, who make their own laws at monthly town meetings. There is a Cabinet of Ministers, on which both sexes are represented. There is no separation of sexes, boys and girls living in families of ten or twelve, in cottages with a lady, or a lady and her husband, as its head. Offences against law and order are dealt with at a weekly Sessional Court by a 'citizen' judge and jury, and there is a miniature prison, over which a 'citizen' keeper presides. The motto of the Republic is 'Nothing without Labour.' The duty of labour and of good conduct is not imposed from without by force, or institutional authority, but evolved from within. There is absolute liberty for any citizen to be idle or mischievous, but, in the former case, he will starve, and, in the latter, if he is not dealt with as an offender and placed in prison, he incurs the disapproval of the community, who are extremely jealous of the honour of the Republic. Thus, at an early age, the citizen learns by practice, and daily experience of the real conditions of life, that law and order must be obeyed, and that his comfort and welfare can only be secured by personal effort." A juvenile Utopia of this kind may do in America, but misgivings will arise as to its success in England. Perhaps the Boy (and Girl) Scout movement is the nearest equivalent of which we are capable.

The Japanese Civil Code.—We have received Volume III. of Mr. de Becker's *Annotated Code of Japan*, a careful translation with useful explanatory notes of Book IV. of the Code. To the student of comparative law that Book is by far the most interesting part of the Code. In the earlier books the influence of the West was often decisive. In Book IV., dealing with the family, marriage, parent and child, parental power, the family council, etc., there are a few traces of the influence of Western jurisprudence. But in the main it describes a social organisation quite distinct from ours; one in which not the individual, but the family, is the unit. In some instances the effect of outside influence has been to give to Japanese primitive customs a degree of precision and sharpness of outline which they did not possess. In an interesting note with respect to the family council, which has large

powers, Mr. de Becker remarks: "The Japanese family council closely resembles the family meetings of Rome, France, and Spain, and has its counterpart in Louisiana owing to the latter State having adopted the French law in 1808. It is curious that an institution such as this, which in Europe is considered a curious survival and descendant of an institution found among all primitive Aryan people, should have been in existence in Japan in a more or less crude form for centuries. Of course, the general legal form or 'dress' has been altered by the Japanese draftsman, in order to bring the institution more or less into line with the Western codes; but the fact remains that the general idea or principle underlying the family council has come down from time immemorial, showing that Japan too had a vague (though not formulated) conception of the family as a kind of corporate body, whose members ought to be consulted when any danger threatens the 'house' or its connections." Altogether a remarkable example of what is so often illustrated in the history of jurisprudence: when two legal systems meet, the more developed calls forth, fosters, and develops what is merely inchoate, crude or latent in the other.

The Probation of Offenders.—The system of probation is closely allied to that of the indeterminate sentence, but it is differentiated in this, that it dispenses with imprisonment altogether. The system has spread with remarkable rapidity. Started in Massachusetts in 1875, it has extended itself to thirty-seven States of America, to Great Britain, Germany, Hungary, Canada, Australia, and New Zealand. Here it is chiefly identified with Children's Courts and juvenile offenders, but in America it has a wider scope and is fast becoming an essential adjunct of the judicial system for all offences not demanding commitment to prison. "It saves the offender," as Sir Ruggles Brise points out, "from the stigma of imprisonment, his family from loss of wages, and the public from the expense of the prisoner's support. Certainly nothing could be more unsatisfactory than the present method of short sentences. The futility of it is forced on us in every day's newspaper, and if scientific confirmation were needed it may be found in Prof. Liszt's three famous paradoxes: (1) The probability that any one will commit a crime is greater if he has already been punished than if he had never been punished; (2) the probability that any one will commit a crime increases with the number of punishments he has already undergone; and (3) the probability that a man who is released from punishment will commit a new crime in the shortest possible time increases with the length of sentence he has undergone. But if the probation system is to be effective—this is Sir Ruggles Brise's opinion—it must be worked by officers duly appointed by the State to keep offenders under strict and organised supervision, otherwise the system may only mean immunity for the malefactor.

Maitland's Collected Papers.—In these volumes Mr. Fisher has given us the gleanings of the rich harvest of Maitland's genius. Maitland, as Mr. Fisher well says, was not only "a great discoverer in history," he

was "an incomparable populariser of his own and other men's knowledge." And here in every page is the charm of that brilliant pen. What variety too! Now it is of the "Tribal System in Wales" that he is discoursing, now of the "Mystery of Seisin," now of "Herbert Spencer's Theory of Society," now of "Kindred and the Blood Feud," now of "The Deacon who was burnt at Oxford for turning Jew for the love of a Jewess." Whatever the topic, Maitland is "always learned, always original." One of the most interesting of the papers is that in which he asks "Why the history of English Law is not written." We know that it is impossible to write the simplest book about our land law without bringing in the statutes of "De Donis" and "Quia Emptores."

> Well! (says Maitland) a stranger might exclaim, What a race of mediævalists you English ought to be! But on inquiry we shall find that the practical necessity for a little knowledge is a positive obstacle to the attainment of more knowledge. A lawyer finds on his table a case about rights of common which sends him to the statute of Merton. But is it really the law of 1236 that he wants to know? No, it is the ultimate result of the interpretations set on the statute by the judges of twenty generations. The more modern the decision the more valuable for his purpose. That process by which old principles and old phrases are charged with a new content is from the lawyer's point an evolution of the true intent and meaning of the old law: from the historian's point of view it is almost of necessity a process of perversion and misunderstanding. . . . What the lawyer wants is authority, and the newer the better: what the historian wants is evidence, and the older the better. It is possible to find in modern books comparisons between what Bracton says and what Coke says about the law as it stood before the statutes of Edward I., and the writer, of course, tells us that Coke's is the better opinion. Now if we want to know the common law of our own day Coke's authority is higher than Bracton's, and Coke's own doctrines yield easily to modern decisions. But if we are really looking for the law of Henry III.'s reign, Bracton's lightest word is infinitely more valuable than all the tomes of Coke. . . . If we try to make history the handmaid of dogma, she will soon cease to be history.

And this is what the practising lawyer in England is always trying to do. He does not care about reconstructing the past, he wants to win cases. And as things are the practising lawyer dominates the situation. It is to him that all the emoluments and all the honours of the profession go: his career which kindles the ambition of every student. The research student, like the poet of old, "laudatur et alget."

Comparative Law in Blue-Books.

The Parliamentary Papers bearing upon the subject of comparative legislation issued since the last notice[1] illustrate the practical value of the subject and the various forms in which it may be made available. The appendix volume to the Report of the Royal Commission on the Poor Laws and Relief of Distress, containing a description of the foreign and colonial systems of poor relief, with a memorandum on

[1] See Journal, vol. xi. p. 512.

the relief of famines in India, cannot fail to interest the social worker and all who are concerned to find a solution for the numerous problems relating to the welfare of the poor. In form the Blue-Book [1] is one of the best comparative legal studies which have been published under Government auspices. It contains the text of the laws and official documents concerning the details governing the systems in representative foreign countries (France, Belgium, Germany, Denmark, and Norway) and British Dominions (New Zealand, New South Wales, Victoria, Queensland, Ontario, and Nova Scotia). But recognising that the text of the enactments is of little use without information as to the method of their administration, the Report contains a series of memoranda on poor-law administration in those countries, including separate descriptions of the organisation in three large cities—Paris, Berlin, and New York. The whole is prefaced by a summary comparing the principles and practice of the different countries. It may be useful to attempt to give in outline the scheme of the Report.

Foreign Poor-Law Systems.—The changes in industrial conditions and the "urbanisation" of the population during the past thirty years have led to the growth of a considerable body of legislation to deal with the unemployed, the unemployable, and vagrants. Another set of statutes has been concerned with the care of those dependent on them—their education, employment, and feeding, and the assumption by the State of parental responsibility. The neglect of adequate care and control has called for legislation as to the treatment of juvenile offenders. The crowding of the population into towns has required the State to take action in regard to the prevention and demolition of slums and the supply of adequate housing in urban areas. Accompanying this legislation, to deal with special difficulties there has been in many countries considerable revision of the poor laws during the last forty years. This legislation, however, is concerned rather with the juristic aspect of the subject, for example the law of settlement, the liability of relatives and the constitution of the relief authority, than with the method or principles of relief.

The poor-law systems may be assigned to one of two classes, though the distinction between the two tends to disappear. On the one hand are the States in which there is recognition of a public obligation to relieve the necessitous, and on the other the States which regard relief of the poor as essentially a matter of grace or charity. The distinction, so far as it maintained, leads to another. To carry out the former principle requires some general territorial organisation [2] which is conspicuous by its absence under the latter method.[3]

[1] Cd. 5441, Wyman & Sons, 3*s.* 9*d.*

[2] For example, in the United Kingdom, Germany, Denmark, Norway and Sweden, the greater part of Austria, a few cantons in Switzerland, the States of the American Union, New Zealand, and certain portions of Canada, such as Nova Scotia and New Brunswick.

[3] As in France, Belgium, Italy, Holland, the Australian States, with the possible exception of Western Australia, and the older portions of Canada (such as Quebec).

Right to Relief.—This branch of the subject is considered in the Report in the form of answers to two questions: (*a*) to what extent and in what sense has a right to relief been formally granted? and (*b*) how far is such a right enforceable? "A characteristic of modern poor-law legislation is the enactment of a statutory claim to public relief on the part of the necessitous." This is so even in some of the countries whose system is based on charity, though, owing to the absence of adequate machinery of administration, the statutory guarantee must be largely illusory. The most precise enactment, perhaps, on this point is contained in the Norwegian law: "Every person lacking the means of maintaining life or of securing medical assistance in case of illness, or who is unable to provide himself with absolute necessities, . . . shall, in so far as his needs cannot otherwise be met, be accorded relief by the relief authority to the extent and in the manner found most suitable by the authority."[1] Where a public obligation to provide relief is admitted, and the funds are available for its bestowal, the claim to relief approaches to a right. "The obligation to grant relief under certain conditions implies a right to claim it. Most poor-law systems have not gone beyond this point, and where this is the case the grant of relief depends entirely on the judgment of the local relief authority."

Conditions Attaching to Relief.—The first is settlement, which in principle is negative in character. Relief will not be given unless the applicant can prove residence in the locality for a certain period. On the other hand, there is an implied obligation on the locality to give the relief. The legislation shows a steady tendency to reduce the qualifying period of residence.[2] But there is a general recognition of an obligation on the part of the relief authority, in whose district a case of destitution occurs, to grant relief in the first instance even if the fact of non-settlement is known.[3] Accompanying the obligation to relieve without regard to settlement has been a right to recover the cost from the district of settlement, but there is a tendency to restrict the exercise of this right. "A further mitigation of the effects of a strict law of settlement is found in the very common provision enabling the local relief authority to throw the burden of paupers whose settlement cannot be ascertained on an authority of wider area, such as the county or the State."

The corollary to a requirement of settlement is the right of removal. In the countries where the right is still recognised it is limited to persons actually

[1] General Poor Law of May 1900. Other examples are the Belgian Poor Law of November 27, 1891 Art. 1, and Prussian Law of March 8, 1871, s. 1.

[2] One year in France (Law of 1893), Germany (Law of 1908, s. 10), and New York (1896, c. 225, s. 40), two years in Norway (Law of May 2, 1900), three years in Belgium (Law of November 27, 1891), and five years in Denmark (Public Poor Law, April 9, 1891, s. 16).

[3] For example, Law of the German Empire of 1870, s. 28; Denmark, Law of 1891, s. 43; Norway, Law of 1900, s. 10; France, Medical Relief Law, July 15, 1893, Art. 20; Belgium, Law of 1891, Art. 1; and New York, 1896, c. 225, s. 42.

in receipt of relief. There is, however, a tendency to abolish or further restrict the right.

"The liability of relatives within specified degrees of relationship to contribute towards the cost of relief is practically universal in those poor-law systems which are based on local obligation and obtains also to some extent in other systems." Immediate ascendants or descendants are liable to contribute—that is, father or mother, as regards relief to their children under age, and *vice versa*.

The right to recover the value of relief from the person relieved, in the event of his becoming able to repay, is also fairly general.

The receipt of poor relief carries with it, in many countries, certain civil and political disabilities. The commonest of these are disfranchisement and incapacity for election on public bodies. This penalty is, as might be expected, attached to the receipt of relief mainly in those States whose poor law is based on the principle of local obligation, though not universally; but it also exists in many States where poor relief is primarily charitable.

Poor Law Area.—At the root of any scheme of national organisation of poor relief lies the selection of a suitable area for administrative purposes. While relief was a charitable act by neighbours, it followed as a necessary consequence that the decision as to its necessity rested with the community immediately in touch with the applicant. The parish or smallest area of civil government has been, and still is, in a large measure the unit, but in nearly every system it has been found necessary in the interests of efficient administration to transcend the limits of this area "But a more effective motive in the direction of widening the poor-law area is to be found in the recognition of the need for classification and for treatment according to needs as distinct from bare relief. Classification not only involves elaboration of method both in indoor and outdoor relief, but leads directly to the recognition of the fact that the relief of certain classes of poor should not equitably be left to be borne wholly by the parish or commune, nor, in certain cases, even their claim to relief to its single judgment." The tentative efforts to extend the poor-law area are still in the experimental stage, and the record of the various schemes in different countries forms a particularly instructive section of the report in view of the importance of the subject in any scheme for the reform of the English poor law.

Relief Authority.—The constitution of the relief authority in England and Ireland is stated by the Report to be "practically unique." There appears to be no parallel to the control of the relief being exercised by a directly elected authority with the power to obtain from the rates what funds it requires without restriction, subject in administration only to a central State authority. It is suggested that the Hospital and Charitable Aid Boards in New Zealand[1] approach most nearly to this form. They are composed of the representatives of local authorities within defined

[1] Consolidated Statutes, 1908, c. 77.

districts upon whom they are entitled to call for such contributions as are needed in aid of the expenditure of the authorised charitable institutions within their respective areas. In other countries the relief authorities are of two types. They may be composed of persons nominated by the local civil authority and of certain ex-officio members, or the local civil authority may itself be the relief authority and delegate the administration to a committee or officials. The former class of authority enjoys independence of administration, but is dependent in the matter of funds on charitable endowments supplemented by subsidies voted by the rating authorities.

Co-operation of Official Relief and Voluntary Agencies.—There are few questions of more practical importance in England in the administration of charitable relief than the means by which the official poor-law administration can make use of the vast amount of voluntary and charitable effort which is available. It is a direction apparently in which much may be learnt from other countries. The voluntary assistance of individuals is frequently permitted for the work of investigation into applications for relief, though the practice is not always legally recognised. In particular it has been co-ordinated with State action in regard to child relief. As a basis of the Elberfeld system is in some countries an obligation imposed by law to render unpaid service.[1] Besides the difficulty in regard to the co-operation of individuals there is the question of the position of charitable organisations. The opinion is expressed that a useful development is the co-operation between public and private charity by means of a local organisation of whose functions the general register of assistance forms only a part. The third form of co-operation between public and private relief is the simple utilisation of charitable institutions by the public relief authority, which is particularly applicable to special classes of poor, for whom the national system of relief organisation may find difficulty in making provision.

Poor-Law Administration in Large Towns.—Descriptions of the systems in Paris, Brussels, Berlin, Copenhagen, and New York form the basis of the consideration of a problem which it is admitted has not always found a successful solution in England. Every large town has several districts within its area of widely differing conditions, social and economic. Yet it is desirable to retain the community of interest represented by the town as a whole, and in fact the responsibility for administration is centralised for the whole area. As the town increases so the greater becomes the necessity for decentralisation, which is effected in connection with the receipt and investigation of applications for relief and the administration of out-relief. In order that the central authority may retain financial control the local committees to whom the latter duty may be delegated budget periodically for what they need, or if the work be assigned to official administrators specific amounts are allotted to them from time to time. In all cases the central authority "retains full control (*a*) over

[1] Prussian Poor Law of 1871, s. 4, and Norwegian Law of 1900, s. 25.

the grant of institutional relief and the management of the institutions, and in some cases also over permanent outdoor relief, (*b*) over the outdoor medical relief service, though the grant of medical out-relief in individual cases may be left to the district committees, (*c*) over child relief, (*d*) over the *personnel* of the entire poor relief service, and (*e*) over the finance of all branches of relief, including that administered by the local out-relief committees. These branches of the poor-law service may indeed be administered by separate committees or departments of the central authority, each with its own staff, but they are never within the provinces of the local committees."

Classes of Poor Relieved.—Statutory distinctions have not yet been made to any marked extent between the classes of persons who may receive relief, so as to exclude one or more classes. The movement in England in favour of "classification" is merely part of a general tendency, which finds expression mainly in a readiness to remove both the aged and infirm from the general scheme of poor relief. Children, too, tend to become a class requiring separate treatment, though in this case perhaps it is because poor relief constitutes only a small part of the large amount of legislation dealing with their welfare. Two important tendencies are noted in these laws concerning the welfare of children. One is to regard the needs of the child as of first importance, so that it even predominates over the parental obligation and parental authority, and the other is to extend the methods of treatment originally provided for "neglected children" to those whose claim to relief is founded on merely physical need. Although "no branch of poor relief has been more debated at local and international conferences or by poor-law authorities" than the methods of dealing with the able-bodied poor, yet no defined principles yet seem to have received general acceptance. There is a certain amount of agreement on two points. There is no general disposition to prohibit relief to this class, as in Scotland. On the other hand there is a general consensus of opinion as to the need for applying vigorous measures to the "workshy."[1]

Methods of Relief.—So far as ordinary poor relief is concerned, the grant of money or articles of food, clothing, or fuel to the poor in their own homes is the most general form of assistance in all systems. For bedridden or senile feeble-minded it is found necessary in nearly all cases to provide some form of institutional relief. In connection with the method of giving relief to children, there is the controversy between the relative merits of life in an institution and boarding out. The conditions in Australasia and Canada readily lend themselves to the extension of the boarding-out system, since there are many ready to take a child into their home. It is interesting to note that the desire to do the best for the child, although resulting in a separation from the natural parent, leads to a recognition that the rightful place for its full development is as the member of a family, and thus to

[1] See for example Laws of 1891 in Belgium and Denmark.

commit it to foster-parents who would provide the sympathetic surroundings of a home.

Medical relief is a separate branch, which is rarely fully supplied by private charity. In nearly all the countries "the local relief system has had to be supplemented in the matter of medical assistance either by authorities of wider area, such as the county or the State, or by independent action on the part of the communal or municipal authority in the provision of public hospitals." The system of medical relief tends to develop on its own lines, since the conditions applicable to the grant of ordinary poor relief are not applicable.

Finance.—"Nearly every poor-law system recognises three normal sources of supply—(1) local rates, (2) grants in aid from the funds of an authority of wider area, such as the county or the State, and (3) charitable gifts or endowments." Every poor-law system except the English and American admits assistance from the last.

Workmen's Insurance.—The summary portion of the Report on the Foreign and Colonial Systems of Poor Relief concludes with three tabulated statements of the law in regard to insurance against sickness, old age and invalidity, unemployment and accident. It may be supplemented by the information just published in the Fourth Abstract of Foreign Labour Statistics[1] published by the Board of Trade. The Introduction (pp. xlix-lx) not only summarises the figures, but also gives some particulars of the French law of April 5, 1910, making obligatory insurance against old age and infirmity, and also of laws in Swiss cantons, Norway and Denmark, relating to State-assisted employment benefit.

Merchandise Marks.—A second Blue-Book[2] represents another way in which the collection of laws of other countries is of practical value, though differing widely in form and scope from the Report prepared for the information of the Poor Law Commissioners. It contains the laws in force in the principal foreign countries to prevent the sale or importation of goods bearing a false indication of origin. Its preparation has been called for by the mercantile community, who have found that foreign goods are being sold abroad with markings that they are of British origin. Inquiry was made by the Board of Trade, with the assistance of the Foreign Office, as to the existence of any remedy against this fraud. Information was obtained upon four points: (1) The laws in force abroad to prevent the sale or importation of goods bearing directly or indirectly a false indication of British or other origin, and of any Regulations made under those laws; (2) the manner in which the laws are enforced, and whether British traders or His Majesty's Government, acting through His Majesty's representatives or otherwise, could take steps to secure the enforcement of the laws where the interests of British trade are affected, and also the

[1] Cd. 5415, Wyman & Sons, 2*s.* 1*d.*
[2] Cd. 5531, Wyman & Sons, 10*d.*

probable cost of prosecutions; (3) any steps that are taken to prevent the importation of goods bearing directly or indirectly a false indication of British origin; and (4) the requirements, if any, as to the marking of imported goods to show the country or place of origin or to denote that the goods are foreign. The general result is to show that in foreign countries there is not a protection similar to that afforded by the English Merchandise Marks Act, 1887.

Dominions Report.—The second report of the Dominions Department of the Colonial Office[1] may be considered to have a general interest, but its form, as so often happens in the case of Blue-Books, militates against its circulation other than by extracts through the columns of the Press. The legal section is a large and important part of the volume. It presents a summary of the legislation in the Dominions, with the full text of ten important Acts. It is of value to have the material brought together in this form. The annual continuance of the series will increase the utility of each issue.

Referendum.—The White Paper containing "Reports from His Majesty's representatives abroad respecting the institution known as the Referendum"[2] compares unfavourably with the article in the April number of the *Quarterly Review*, though in one direction it is more comprehensive. The Foreign Office paper deals with Bulgaria, Cuba, United States, and Switzerland, but has nothing about Australia, which forms the subject of an excellent paper in the *Quarterly Review* by Professor Harrison Moore and Mr. Ernest Scott as a companion to the contributions by the President of Harvard and Professor W. Oechsli respectively on the Referendum in the two latter countries.

Payment of Members of Parliament.—Two White Papers deal with this subject. One[3] consists of a series of reports obtained by the Foreign Office from His Majesty's representatives showing (1) salaries paid to members of the Parliament of the United States and of European countries, and (2) travelling allowances and other privileges of a pecuniary character enjoyed by the members. The other is a companion return[4] giving the same information in regard to the Parliaments of the Dominions beyond the seas, and the statutory authority by which the payments are made to the members. The information, it may be noted, was compiled in the Colonial Office Library without reference to the Dominions.

C. E. A. B.

[1] Cd. 5582, Wyman & Sons, 1*s.* 6*d.*
[2] Cd. 5522, Wyman & Sons, 2½*d.*
[3] Cd. 5714, Wyman & Sons, 2½*d.*
[4] Payment of Members (British Dominions), H.C. 80, Wyman & Sons, 2½*d.*

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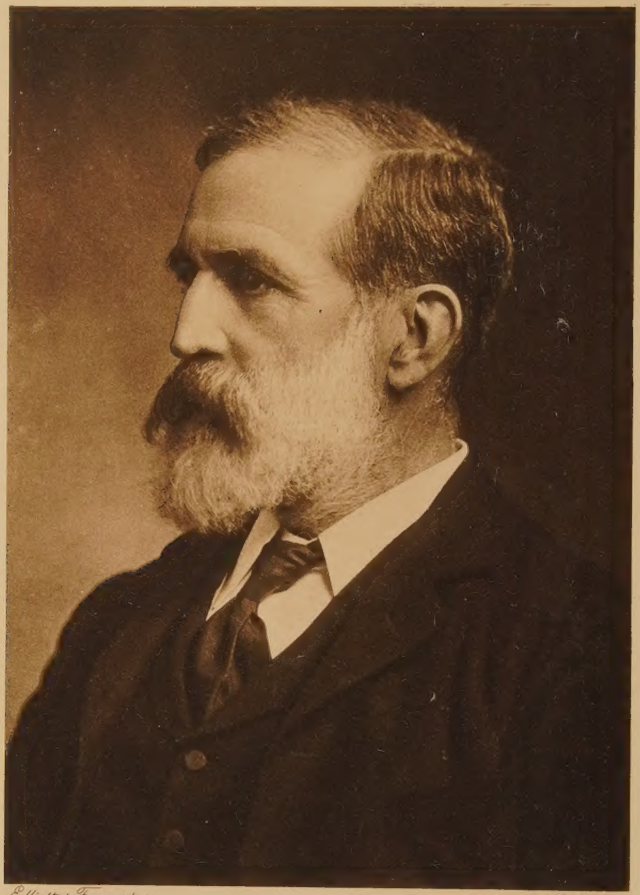

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